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ALIENS UNDER THE FEDERAL LAWS OF THE UNITED STATES

A DISSERTATION

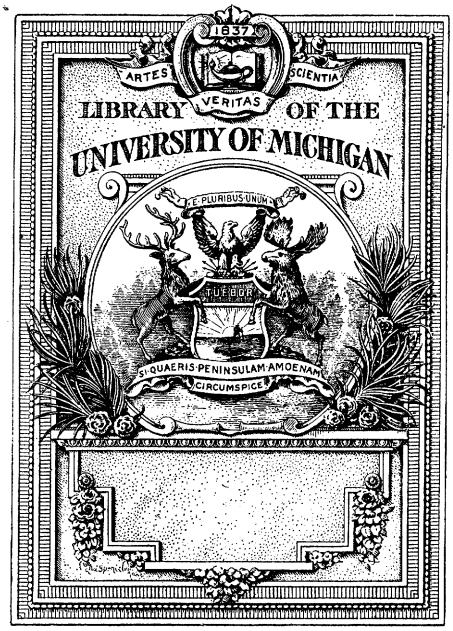
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL OF ARTS AND LITERATURE IN CANDIDACY FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

(DEPARTMENT OF POLITICAL SCIENCE)

BY

SAMUEL MacCLINTOCK

CHICAGO
ILLINOIS LAW REVIEW
1909



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PREFACE

This thesis is an attempt to trace the history of the more important federal laws of the United States affecting aliens. The first chapter is in the nature of a general introduction, or back-ground, to the study proper. It shows how citizenship and alienage arise, and the rights, duties, and disabilities connected with the latter status. It then outlines the relation between the citizenship of the federal state and of its constituent commonwealths, in order to show the jurisdiction of each of these with regard to the subject considered.

The body of the thesis falls in the chapters which deal with the federal legislation affecting aliens. Most of this legislation has been enacted without having aliens, primarily, in mind. For example, the legislation regarding shipping, patents, public lands, etc., has had our own citizens in view primarily, and resident foreigners only incidentally. For this reason it has been found both difficult and tedious to extract the material from such legislation bearing upon aliens alone.

No claim is made that all the material has been found. In order to secure it all it would be necessary to go exhaustively through the total body of legislation having a possible bearing upon aliens, and this is manifestly impossible when one considers the wide range of such legislation. When we come to the legislation dealing with the right of aliens to hold real estate in the territories, we are on more certain ground, for the territories are under the immediate control of the national government and Congress has legislated directly with reference to aliens in such territories.

The final chapter is given to the consideration of treaty rights —the right to hold property, to the protection of life and property, and to other rights which may be incident to residence. Then the exclusion and expulsion of aliens as a right of sovereignty and in the light of our experience is considered.

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CONTENTS

I.

ALIENAGE AND CITIZENSHIP.—Position of aliens in ancient and medieval times. Citizenship the normal relation to the state. Citizenship dependent on municipal law. The right of expatriation. Rights, duties, and disabilities of aliens. Citizenship in the American colonies and under the federal constitution. The control of suffrage. Restrictions as to office-holding.

II.

FEDERAL LEGISLATION.—Shipping, Patents, Trademarks, Copyrights. Our shipping policy and its British precedents. American registry reserved to American citizens. Our coastwise trade confined to American vessels. Discriminatory tonnage dues. Patents granted aliens and citizens alike. Trademark legislation and conventions. Copyrights at common law and by reciprocity.

III.

FEDERAL LEGISLATION.—Public Lands; Real Estate in the Territories. Right to purchase open to aliens. Preemption and homestead rights restricted. Results of our liberal land policy. Legislation excluding aliens from real estate in territories. Subsequent modifications of this legislation. Why such legislation will not be attempted again.

IV.

TREATY RIGHTS OF RESIDENT ALIENS.—The treaty making power of the federal government. Provisions of treaties as to property rights. Federal legislation protecting aliens. The Japanese school controversy. Exclusion and expulsion of aliens. Attitude of our government. Congressional legislation on this subject. Administrative proceedings satisfy the requirements.

ALIENS UNDER THE FEDERAL LAWS OF THE UNITED STATES

By Samuel MacClintock

I. Alienage and Citizenship[a]

In ancient times a stranger, as such, was generally regarded and treated as an enemy. During the middle ages both he and his property were at the mercy of the prince in whose country he sojourned. He was subject to heavy exactions for the privilege of residing in the country and carrying on trade; he was without personal rights, and upon death his property escheated to the prince. In modern civilized states this harsh rule has been so far abrogated that the property rights of an alien have been assimilated closely to those of the citizen, and, in some of our states, even political privileges have been extended them. The rights and privileges which a citizen of one country enjoys while in another are, therefore, interesting historically, as showing how far the world has advanced, and are of present day worth as indicating the actual status of a foreigner while travelling or sojourning in another land.

Citizens.—The normal relationship of an individual to the country and government of his birth is that of citizen, or subject. The common-law doctrine was that all persons born within the jurisdiction and allegiance of a country were its natural born subjects, its natives.[1] The exceptions recognized to this rule were children born to the diplomatic representative of a foreign government, or an alien enemy in hostile occupation of the place where the child was born, or upon the public vessels of a foreign power.

The obligation of support and obedience which the citizen or subject owes his country is expressed by the word allegiance. In

[a]This is the first of a series of four papers. The others will be entitled respectively: Federal Legislation—Shipping, Patents, Trade Marks, Copyrights; Federal Legislation—Public Lands, Real Estate in the Territories; and Treaty Rights of Resident Aliens.

[1]'Citizen' and 'subject' are used in the same sense, the former term being generally employed in speaking of the members of a republic, the latter of a monarchy. Professor Moore prefers the term 'nationality' to 'citizenship' "in order that it might comprehend not only those who may be called 'citizens' but also all those who, whether they may be called citizens or not, may be called 'nationals.' " (Int. L. Dig. sec. 372). The term national would, therefore, designate the status of one not an alien to our government and yet not a full citizen, as, for example, a Porto Rican. See Col. L. Rev., III., 13.)

return for this allegiance on the part of its citizens or subjects the state owes them protection.

There is no rule of international law by which citizenship is determined. Each nation is the sole proper judge of who are its citizens or who may become its citizens. Citizenship, then, depends upon municipal law and denotes within a particular state the possession of full civil and political rights not dependent on age or sex. Citizenship may arise as result of birth, of naturalization, or of the annexation of territory. If it arises as a result of birth, it may be in accordance either with the theory of "soil" or of "blood". According to the theory *ex jure soli* or *loci* all persons born in a given terrtiory are citizens "by right of the soil." Thus, the French law holds all persons born in France, though of foreign parents, to be French citizens, unless such persons, relying upon the citizenship of their parents, renouce allegiance to the country of their birth within a year after reaching their majority. According to the other theory, that of *ex jure sanguinis*, citizenship depends upon blood relationship, or descent. This theory prevails in many countries and has some times been inaccurately called the doctrine of the law of nations. According to this theory the political status of the child does not depend upon the place of birth, but follows the status of the father, if the child is legitimate, and of the mother, if the child is illegitimate[2]

It is an inherent right in each independent nation to determine for itself, and in accordance with its own laws, what persons may become its citizens and upon what terms. Naturalization is effected, therefore, only in accordance with the municipal law of the country to which the foreign born person goes; that is, it is not dependent, in any way, upon the laws of the applicant's former country. If he is safely beyond the jurisdiction of his former state, it is immaterial whether the applicant did or did not have its permission to expatriate himself.[3] It has been declared that "naturalization is the act of adopting a foreigner and clothing him with the privileges of a native citizen."[4] An alien, when duly naturalized, possesses the privileges and immunities of a native born citizen. In our country, however, he is ineligible, under the constitution, to the office of president, or vice-president, and, in some states, to that of governor.

By the common law doctrine natural born subjects owed alle-

[2]Vattel, sec. 212-215.
[3]For. Rel. 1893, 499.
[4]*Boyd v. Nebraska*, 143 U. S., 135.

giance to the sovereign from which they could not by any act of their own divest themselves. This was the law at the time when the colonies separated themselves from the mother country and is still the rule in some countries, such as Russia and Turkey. The harshness of this doctrine of natural allegiance was mitigated in practice long before it was given up in theory. In modern times the essentially free and voluntary relationship of the individual to the state is generally recognized in the right to forswear allegiance to the country of birth and to attach one's self permanently to a country of adoption, provided one has discharged all his obligations to the country of his birth.

It is generally considered, however, that a clear legal right to expatriation does not exist in the absence of a positive rule to this effect.[5] In the United States the right to expatriation has long been recognized and seems to have been legally declared by the expatriation act of July 27, 1868,[6] though the court in *Comitis v. Parkerson*[7] denied that this was the effect of the act. Such a right, however, has generally been regarded in this country as being "fundamental,"[8] and whatever may be the meaning of the act of 1868, expatriation has been, and is, unhesitatingly allowed in our governmental practice.[9]

While the right to expatriation has never been expressly granted in so many words by Great Britain, it has been legally recognized since the passage of the "Expatriation Act" of 1870.[10] France gives the right to her citizens to change their allegiance and so does Germany, if made in good faith,[11] for the purpose of founding homes in foreign lands, and if existing obligations have been fulfilled. So with the other countries of Europe, with the exception of Russia and Turkey, where the right to withdraw is held to be a matter of imperial favor.

ALIENS.—When a citizen of one country takes up his domicile in a foreign country he is an alien to the land in which he sojourns, without at the same time, losing his citizenship and its obligation of allegiance. An alien is, therefore, a foreigner who, though residing in one country, owes allegiance to another.[12] In Great Britain an

[5]Cockburn, "Nationality," p. 63.
[6]Reenacted in sec. 1999 R. S.
[7]56 Fed., 556.
[8]Whart. Confl. Laws, 85; 8 Op. A.-G. 139; 9 Op. A.-G. 356.
[9]For. Rel. p. 20, Dec. 23, 1903, no. 49.
[10]33 Vict., c. 14.
[11]'Good faith' means that the person owes no military obligation and is guilty of no crime.
[12]Bouvier: L. Dict.; *Lyons v. California*, 67 Cal., 380.

alien is defined as one born out of allegiance to the king; in the United States, as one born out of the jurisdiction of the United States, not naturalized in accordance with the constitution and laws of the United States, or declared to be a citizen by statute.

Owing to the general adoption in recent times of the doctrine of expatriation, and to the immense development of international trade, with the consequent cheapening of the means of transportation, the number of aliens found in most countries is vastly greater than in former years, and the position of aliens before the law is of consequently greater importance.[13]

Aliens may be distinugished as alien friends or alien enemies according to whether the country of their allegiance is at war or at peace with the country of their domicile. A distinction may also be drawn between resident aliens, those who are domiciled in a state to which they are foreigners, and non-resident aliens, those who are only sojourning in such a state.

RIGHTS OF ALIENS.—The rights which aliens have arise from the operation of the law of nations or from municipal law. The fundamental right is that of protection of person and of property.

Formerly, discrimination against aliens in the private laws of different countries was the general rule. In modern times practice varies. Some nations favor reciprocity in such matters, as is seen in the provision of the French Civil Code that "an alien shall enjoy in France the same civil rights as those granted to French persons by the treaties of the nation to which such alien belongs." Other nations make practically no distinction in their private laws between natives and aliens.[14] Modern nations tend more and more to extend the rights of private law to aliens as fully as these exist for natives. Such equality is demanded by the law of nations so far as the protection of person and property is concerned. Beyond this point, however, a state can treat foreigners within its jurisdiction according to its discretion. Thus it can compel them to register their names, can exclude them from holding real estate, and from entering certain trades and professions.

As a subject has, while in a foreign country, only the rights and privileges accorded by the law of that country and by international comity, he can call upon the government of his allegiance for its

[13]The foreign born population in the United States, as determined at the twelfth census, numbered 10,460,085. Of this number there were 1,070,126 male aliens of voting age—those who had taken out their first papers not being included.

[14]The prohibition of the ownership of vessels in England, and in the United States, is an exception.

protection and intervention only when oppressed or subjected to an unlawful act by the government under which he is residing. After his government secures for him the ordinary protection afforded by the law of the land, he is completely subject, in the absence of treaty stipulations, to the municipal law.

DUTIES OF ALIENS.—In return for the protection which is furnished him, the alien owes local and temporary allegiance. During his residence he is bound equally with natives to obey all general laws for the peace and safely of the state.[15] Such laws as are applicable to the rights and duties of citizens only do not extend to the alien; but if he becomes involved in disputes with citizens, or with other resident aliens, or is guilty of an illegal act, he is subject to the ordinary tribunals.[16] Thus he may be tried for treason in giving aid and comfort to the enemies of the country.[17]

This principle of amenability to the municipal law, being founded on the dictates of justice and public safety, is universely recognized and adopted.

Aliens domiciled in a country are liable for both personal and property taxes and can be compelled, under the same conditions as citizens, to help maintain public order and safety. They are not, however, liable to military service in times of peace, because they are not subject to the personal supremacy of the local state.[18] President Lincoln's proclamation on May 4, 1863, declined to allow the plea of alienage as an excuse for failure to do military service on the part of those who had declared their intention to become citizens. Such persons claimed that their declarations did not conclusively bind them, and that either by virtue of treaty, or by the law of nations, they were exempt from such service. This claim was not allowed, but all aliens who did not wish to comply with the President's proclamation were given sixty-five days in which to withdraw from the country. By the act of February 24, 1864,[19] no person of foreign birth who had voted was to be exempt from enrollment or draft.

As every state has the right to determine by its own laws who shall be its citizens, it frequently happens that a person has a dual nationality; that is, he is under the personal sovereignty of his home

[15]2 Kent's Com. 63; *The Exchange v. McFaddon*, 7 Cr., 116. Webster's Works, VI., 526.

[16]Sec. 563 R. S.; 1 Atk. 51.

[17]*Carlisle v. U. S.*, 16 Wall 147; *U. S. v.Diekelman*, 92 U. S., 520; *Rahdick, v. Hutchins*, 95 U. S., 210.

[18]3 Op. A.-G. 670.

[19]15 Stat. 6.

government to which he continues to owe allegiance, and he is under the territorial sovereignty of that in which he is domiciled.[20] As such conflicts of jurisdiction cannot be decided by any principle of international law, a large number of states have recognized the right of election of nationality upon the person's reaching his majority or within a reasonable time thereafter.[21] As a state's supremacy over aliens is territorial and not personal, it has no right to prevent their departure from its shores whenever they wish to leave, provided they have discharged all their local obligations.

DISABILITY OF ALIENS.—This term is not strictly apposite, inasmuch as, historically, aliens start with having no rights whatever. Nevertheless, it may be used to show what is still withheld from them in modern states which have granted them so many privileges.

According to the common law, no one while out of alligiance to the king could exercise any political rights. In all cases, the voter had to be either a native born English subject or a naturalized foreigner. Even such naturalized persons, however, could not serve as members of the House of Commons until the year 1870.[22] This rule of the common law was in force in all the English colonies upon this continent down to the Declaration of Independence. The converse held true, namely, that all born in the colonies and consequently within the juurisdiction of the king, were citizens of the colonies and owed allegiance to the king.

The political disability of aliens, then, extends to voting and holding office. There is no natural right on the part of a citizen, as such, to exercise the right of suffrage, much less of an alien. It is a privilege which may be conferred or withheld, and is practically always denied to women, minors, and persons *non compos mentis*, as well as to aliens. This is because governments are designed primarily for the benefit of their own citizens, and participation in the political affairs is consequently denied to those who are not full citizens. Some of our commonwealths, however, have broken away from this general rule.

The civil disability of aliens relates chiefly to the power to acquire, enjoy, and transmit real property.

[20]For an interesting opinion of the attorney general in regard to persons of American parentage, born and residing abroad, but American citizens under the act of Feb. 10, 1855, (10 Stat. 604), holding that if, by the laws of the country of their birth, such children are subjects of its government, it is not competent to the United States by legislation to interfere with that relation while such persons continue within the territory of that country, see 13 Op. A.-G. 89.

[21]1 Oppenheim Int. Law, 372; "The Charming Betsy," 2 Cr. 64.

[22]33 and 34 Vic. Ch. 13.

According to the common law, an alien might acquire title to land by purchase or devise, that is, by act of the parties. The title was then divested from the grantor and held by the alien subject to dispossession by the sovereign by means of inquest of office found, or equivalent action;[23] and until such action was taken by the sovereign, he might dispose of it by conveyance, or devise, notwithstanding his alienage.[24] The alien could not, however, acquire title to real proprety by descent, curtesy, or dower; that is, he could not acquire by mere operation of law.[25] Nor did he possess inheritable blood so as to be able to transmit such property to a citizen.[26] Hence, in such case, no inquest was necessary to vest title in the state on the death of the alien intestate or of a citizen intestate leaving only alien heirs.[27]

This rule of the common law seems to have grown out of the feudal conception of the ownership of land. Hansard, in his work on Aliens, says:[28] "Inasmuch as all lands were holden of the king as the sovereign or lord paramount, an alien could not hold them without acknowledging allegiance to the king, which such alien, while his allegiance remained to his former sovereign, could not do."[29]

Thus it is seen that an alien might at common law take an estate in lands by the act of the parties, but that he could not take by the act of the law. As the title to land must always be vested somewhere and the defeasible title is good until divested, a resident alien in possession of land had as much a claim to protection as a citizen. His title and right to possession could not be disputed by the vendor or any other person except the Crown, and the Crown could forfeit the lands only upon inquest of office found or similar proceeding.[30] By descent, however, the alien could not acquire even a defeasible title and he could confer upon others no better title than he himself possessed. So neither an alien nor a subject

[23]Sargent's Bl. 1, 477; *Government v. Robertson*, 11 Wheat, 332.

[24]*De Franca v. Howard*, 21 Fed. 774; *Williams v. Wilson*, Mart & Cy., 248; *Orr v. Hodgson*, 4 Wheat, 403.

[25]1 Bl. Com. 372 *Sutliff v. Forgey*, 1 Cow., 89.

[26]*Blight v. Rochester*, 7 Wheat, 535.

[27]*Fairfax v. Hunter*, 7 Cr., 603; 2 Bl. Comm. 249.

[28]P. 131.

[29]Sir Frederick Pollock accounts for the origin of the rule by saying that it arose from the habit of the English Crown of confiscating the estates of Norman nobles, situated in England, who swore allegiance to the Crown of France after the separation of Normandy from England. The practice thus started, ripened with time into a general rule of law. For another interesting accounting for the rule, see the opinion of Chief Justice Tilghman, in *Jackson v. Burns*, 3 Binn. 75.

[30]2 Bl. Com. 293.

could acquire an indefeasible title from an alien. Alien heirs possessed no inheritable blood and the estate descended to the next person having inheritable blood as though no such alien issue were in existence.[31] If an alien removed his disability by naturalization or otherwise before escheat proceedings, his title became absolute, a complete and indefeasible right against all the world.[32]

As aliens had no inheritable blood, the alienage of any ancestor was a bar to the title, though exceptions were made from time to time that mitigated the harshness of this rule.[33] The law was first modified in 11 and 12 Wm. III., ch. 6, so as to enable the alien to transmit to such of his heirs as might be natural born subjects of the realm. Thereafter the disability of alienage became a bar only when it was in the heir and not in the ancestor.[34] By the act of Parliament of 1870[35] the disability to acquire, whether by purchase or inheritance, and to hold real and personal property was entirely swept away, and the alien was placed in all respects upon the same footing as a native born citizen.[36]

The reason why there is presumed to be an immediate escheat upon the death of an alien land holder, dying intestate, is because in the old theory, the law of the land operates only in favor of citizens and failing to determine who the heirs of an alien are, the law regards him as having died without legal issue.[37] But the law presumes all residents to be citizens[38] and consequently the state must establish by proof the alienage of the land owner and upon office found must actually seize the land by its officers to divest the title from the alien. After forfeiture proceedings the state may release its rights and make the title absolute in the alien heir by legislative act or by a subsequent treaty.[39] An alien's incapacity to hold the land is removed by naturalization before judgment rendered in proceedings on an adverse claim to a patent.[40]

The principles of the English law prevailed in all of the American colonies and continued in all of the subsequently formed states

[31]*Orr v. Hodgson*, 4 Wheat, 453.
[32]*Governeur v. Robertson*, 11 Wheat 332; *Manuel v. Wulff*, 152 U. S., 506.
[33]*Callingwood v. Pace*, 1 Ventris, 413.
[34]*Levy's Lessees v. McCartee*, 6 Pet., 102; *Beavan v. Went*, 155 Ill., 600.
[35]33 Vic., ch., 14.
[36]In one of our commonwealths it has been declared that even a mere declaration of intention to become a citizen had the effect of removing the common law disability as to the holding of real estate. See *Settegast v. Schrimpf*, 35 Tex., 323.
[37]*Goodrich v. Russell*, 42 N. Y., 177; *Crane v. Reeder*, 21 Mich., 69.
[38]*State v. Beackno*, 6 Blackf, 488.
[39]*Fairfax v. Hunter*, 7 Cr., 603; *Jackson v. Clarke*, 3 Wheat, 1; 43 Cent. L. J., 221.
[40]*Manuel v. Wulff*, 152 U. S., 505.

except Louisiana. The disability of alienage in matters of real property continued, therefore, in force, since the right to hold real estate depends upon the municipal law of our several states, and not upon the federal law.[41] Whatever right aliens had to acquire and hold real estate carried with it the right to convey, before office found, to maintain real actions, and the action of trespass.[42]

The common law disability as to land did not extend to personal or movable property. Aliens could acquire, hold, and transmit such property as freely as natives, and could bring suit for the recovery and protection of the property so held.[43] They might even take a mortgage on real estate and come into a court of equity to have the mortgage foreclosed and the land sold for the payment of the debt. They might create a perfectly valid trust in personal property, while as to land such trust could be created only until office found.[44] They might also avail themselves of the doctrine of equitable conversion.[45]

Perhaps the reason why personal property stood in such a different relation from that of real property before the common law was because the former, which now forms so considerable a part of the wealth of every civilized community, was but lightly regarded until comparatively recent times. For this reason, alien friends were allowed to acquire and hold such personal property freely and without restraint. In modern times, if any danger is to be feared by the state on account of the ownership of large amounts of property by aliens, it would seem to be because of the possibility of the control of national funds, and the stocks and bonds of great corporations, rather than of land..

We now pass to a survey of citizenship and suffrage in the colonies and under the federal constitution.

CITIZENSHIP IN THE COLONIES.—The rule of the common law that those born out of allegiance to the king could exercise no political rights has already been stated. This rule was in force generally throughout the American colonies up to the time of the revolution. The only exception known to it in the history of the colonies was the treatment of the Huguenots in South Carolina.[46]

[41]*Lynch v. Clarke*, 1 Sandf., Ch. 583.
[42]*Hughes v. Edwards*, 9 Wheat, 489; *Jones v. McMasters*, 20 How., 20.
[43]1 Black, 322; 2 Kent, 2; *Hughes v. Edwards*, 9 Wheat, 489.
[44]1 Lewin on Trusts, 26.
[45]Dwight on Persons, 132; *Craig v. Leslie*, 3 Wheat, 553. Thus, a devise of lands to a citizen trustee to receive the rents and profits, and apply them to the use of an alien *cestui*, is valid. *Marx v. McGlynn*, 88 N. Y., 357.
[46]McKinley, The Suffrage Franchise in the English Colonies, 132.

There were comparatively few persons in the colonies of foreign birth but the necessity for some provision for naturalizing and thereby conferring political rights upon such as were resident therein was early felt. When foreigners were admitted to the rights of citizenship during this period they obtained them either as a result of a treaty, making special provisions for such rights, (as with the Dutch and Swedes in New York) or by special act of a colonial legislature (as Maryland, in 1666), or else under the terms of a general law passed for that purpose. It thus resulted that there was no uniformity in such matters. Each colony claimed the right to regulate naturalization by its own laws. Some of them expressly excluded aliens from elections or from holding office,[47] but this was not common, and generally the only bar between the foreigner and the franchise was the force of the common-law precedent. In 1740 Parliament forbade the naturalization of any Catholic aliens in the colonies, New York and Massachusetts having already done so.[48]

An act of Parliament of 1746 regarding naturalization prescribed as conditions of citizenship an oath of allegiance, seven years residence, and the profession of the Protestant faith. In 1776 the home government sent out a circular letter to the governors of all the royal provinces, forbidding them to give assent to any law changing the qualifications of electors and elected. It would seem that, by the close of the colonial period, it was required that electors should, in addition to being white persons, be "freemen"[49] should have resided in the district a length of time; should be twenty-one years of age, of the male sex, of the Protestant religion, and possessed of a given amount of property.[50]

CITIZENSHIP IN THE STATES AND IN THE NATION.—In our system of government most of the control over aliens, both as to their political and civil rights, rests with the state govennments. The obligation of the federal government, except as to the territories under its control, arises from its position as a member of the family of nations and from its treaty provisions. Owing to this dual sovereignty a person can be an alien to the national government while in possession of at least most of the privileges of state citizenship. For this reason it seems desirable here to review briefly the

[47]New Hampshire in 1680; Pennsylvania in 1694; North Carolina in 1715; Delaware in 1734.

[48]See Miller, Am. Hist. Assoc. 1, 87, 1899.

[49]In New England this qualification seems to have been equivalent to that of citizen. Bishop, Elections in American Colonies. 47.

[50]See McKinley, The Suffrage Franchise in the English Colonies, 473.

matter of citizenship as controlled by the state and federal government.

With the birth of the new nation, the allegiance formerly due the British sovereign became transferred, theoretically, to the new state. The people residing in the old thirteen colonies became the people of the United States; those who had been subjects of the monarchy became citizens of the republic. Whoever chose to remain on the soil by residence accepted protection, and owed allegiance. It is a question, however, if, in the current thought and practice of the day, this allegiance was not in reality transferred to the thirteen sovereign commonwealths.

As anyone born in the dominion of the king was *ipso facto* the king's subject, so anyone born on American soil now became a natural born American citizen. Under the Confederation the power to regulate naturalization by its own laws which each colony had claimed remained with the separate states. A committee of the Continental Congress proposed to Congress in 1776 that "All persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony."[51] The acceptance of this proposal by Congress thus established an inter-citizenship. The committee then went on to declare that from persons making a "visitation or a temporary stay" only a secondary allegiance was due. In the Articles of Confederation it was provided that "the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states."

If a person was a resident citizen of one of the colonies at the time of the severance from the mother country and sanctioned, expressly or impliedly, the Declaration of Independence, he thereby became a native of the United States.[52] In a Massachusetts case, it was held that if a person was born in one of the colonies and withdrew, never returning after the Declaration of Independence, he was nevertheless a subject by birth and owed allegiance to the state as successor to the king.[53] Likewise, in *McIlvane v. Coxe*,[54] it was held that an *antenatus* owed allegiance to the individual state in which he was born and consequently to the United States, and that if he withdrew from the country and never returned prior to the Treaty of Peace, such action did not affect his allegiance.

[51]Jrs. Cong. June 24, 1776.
[52]*Teare v. White*, 4 N. C., 210; *Boyd v. Nebraska*, 143 U. S., 178.
[53]*Ainslie v. Martin*, 9 Mass., 454.
[54]2 Cr., 280.

These cases were substantially overruled in *Inglis v. Sailors' Snug Harbor*,[55] where the court declared the settled doctrine to be that a person born here, but who left the country before the Declaration of Independence, and never returned, became an alien, and unable, consequently, to take land by descent.[56]

Thus the distinction between citizens and aliens arose with the begining of our existence as an independent nation. By the treaty of 1783 Great Britain and the United States, respectively, were entitled to the allegiance of all persons who, at the time of the treaty, were adhering to their respective governments; those who did not adhere to a government were aliens to it.[57] This arrangement put an end to the double allegiance growing out of the Revolution. All the inhabitants had a reasonable period in which to elect between the new government and the old.[58]

When the federal constitution was adopted the exclusive jurisdiction of national citizenship passed to the federal government.[59] Before 1789 there was no uniform rule of naturalization and the citizenship was first of all that of a state.[60] After Congress had established a uniform rule of naturalization, the states came to require, in their new constitutions, citizenship of the United States in addition to a period of residence in the states, though for some

[55]3 Pet., 99.

[56]The principle of the common law that the division of an empire worked no forfeiture of previously vested rights of property, applied to the lands which British subjects had acquired prior to the Revolution, made such holdings remain in their British owners unimpaired after the Revolution.

[57]*Kilham v. Ward*, 2 Mass., 236.

[58]*Inglis v. The Sailors' Snug Harbor*, 3 Pet., 99. According to the American doctrine the *antenati* ceased to be British subjects at the time of the Declaration; according to the British doctrine, at the Treaty of Peace. Thus, by our contention, a person born here but who left the country before the Declaration, and never returned, became thereby an alien.

[59]In *Minor v. Happersett*, 21 Wall., 162, it was said: "whoever then, was one of the people of either of these states when the constitution of the United States was adopted, became, *ipso facto*, a citizen, a member of the nation created by its adoption. He was one of the persons associated together to form the nation, and was consequently one of the original citizens."

[60]In a contested election case that came before the first Congress there was involved the citizenship of one who had gone abroad while a minor and was away when the Declaration was signed and during the whole course of the war. The question arose: Was he a citizen of the United States? The constitution of South Carolina, of the period, was silent as to citizenship but permitted voting to one who had resided a year in the state and paid a certain tax. In the debate over this case, Mr. Madison declared (An. of C., 1; 404) that as to whether the contestant was a citizen of the United States depended upon the laws and constitution of South Carolina so far as these bore upon the point, and upon general principles, so far as these were applicable.

time after 1789 they continued, under their naturalization laws, to admit aliens to citizenship.[61]

It is apparent, therefore, that we have a double citizenship, one pertaining to the state and one to the federal government. Speaking on this point, Chief Justice Waite said:[62] "We have in our political system, a government of the United States and a government of each of the several states. Each one of these governments is distinct from the other and each has citizens of its own who owe it allegiance and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state; but his right to citizenship under one of these governments will be different from those he has under the other." The point that we have to consider is what privileges and immunities under the federal government a naturalized citizen of a state has. Before the adoption of the federal constitution it is undisputed that each state might confer citizenship upon whom it chose. This right was limited by the provision in the constitution conferring upon congress the power "to prescribe a uniform rule of naturalization," that is, a uniform law for the acquisition of citizenship by aliens. If it were in the power of the states to make citizens out of aliens, and by virtue of such citizenship to make them citizens of the United States, this purpose of the federal government in conferring the power on Congress would be defeated.[63]

The federal constitution further provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." The question is, what privileges, if any, this provision extends to non-naturalized aliens who possess state citizenship. This question was given very thorough consideration in the Dred-Scott case[64] where Chief Justice Taney said: "In discussing this question, we must not confound the right to citizenship within its own limits (state limits) and the rights of citizenship as a member of the Union. It does by no means follow because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state. For, previous to the adoption of the constitution of the United States, every state

[61]Ann. of C., 2, 1778-9; *State v. Deshler*, 25 NJL., 186.
[62]*U. S. v. Cruikshank*, 92 U. S., 542.
[63]See Story, Const. Bk. 3, ch. 16; Kent's Com., 14th ed., Lecture 25.
[64]19 How., 393.

had the undoubted right to confer on whomsoever it please the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundary of the state and gave him no rights or privileges in other states beyond those secured to him by the laws of the nations and the comity of states. Nor have the several states surrendered the power of conferring these right and privileges by adopting the constitution of the United States. Each state may confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he will not be a citizen in the sense in which that word is used in the constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them. The constitution has conferred upon Congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently no state since the adoption of the constitution can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a state under the federal government, although so far as the state alone is concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the constitution and laws of the state attach to that character.''

Judge Curtis, in his able dissenting opinion, did not dispute the position of the majority of the court on this point of federal as against state citizenship. He said: ''Again, it has been objected that if the constitution has left to the several states the rightful power to determine who of their inhabitants shall be citizens of the United States, the state may make alien citizens. The answer is obvious. The constitution has left to the states the determination of what persons, born within their respective limits, shall acquire by birth, citizenship of the United States. It has not left to them any power to prescribe any rule for the removal of the disabilities of alienage.'' The learned Justice did maintain, however, in the same case that ''every free person born on the soil of a state, who is a citizen of that state by force of its constitution, or laws, is also a citizen of the United States.''[65] The opinion of Chief Justice Taney, which seems to have been the opinion shared by the members of the pro-

[65]Justice Swayne, in the Slaughter House cases (16 Wall., 36, 126) declared that ''a citizen of a state is *ipso facto* a citizen of the United States,'' and Justice Story had also said, ''Every citizen of a state is *ipso facto* a citizen of the United States.'' Const. sec. 1693.

fession at that time and since, has already been cited. The majority of the court in the Slaughter House cases also confirmed the position that the citizenship of the United States and of a state are distinct from each other.

Down to the time of the Fourteenth Amendment there was still some question as to whether state citizenship entitled one to the privileges of United States citizenship, as had been urged in the Dred Scott case. Only two or three cases as to what constituted United States citizenship had been passed upon directly. The leading case was that of *Lynch v. Clark*[66] decided in 1844, in the state of New York. In this state it was held that the common law was, so to speak, the law of the United States, and, therefore, that mere birth in this country was sufficient to confer the privilege of citizenship upon Julia Lynch, though her parents were Birtish subjects on a temporary sojourn in New York.[67]

By prescribing qualifications for president, senators, and representatives, the constitution recognized United States citizenship. Nevertheless the uncertainty as to exactly how this citizenship arose led to the declaration in the Civil Rights Act of 1866 that "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." This was soon followed by the Fourteenth Amendment which decared that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Owing to the phraseology used ('subject to the jurisdiction thereof'), there was at first some doubt as to whether this provision was intended to be declaratory of the common-law or of the so-called international-law doctrine. The generally accepted opinion seems to have been that birth within the United States, though of alien parents, was sufficient of itself to confer the right of citizenship, though in the Slaughter House cases it had been declared that "The phrase 'subject to the jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."

In the case of *United States v. Wong Kim Ark*[68] decided in 1898, the Supreme Court set the question at rest. In the course of its long opinion, reviewing all the cases bearing on the point, the court said:

[66]1 Sandf., Ch. 583.
[67]See also *U. S. v. Rhodes*, 1 Abb. (U. S.) 28.
[68]169 U. S., 649.

"The Fourteenth Amendment * * * contemplates two sources of citizenship and two only: birth and naturalization. Citizenship by naturalization can only be acquired under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the constitution. Every person born in the United States and subject to the jurisdiction thereof, becomes at once a citizen of the United States and needs no naturalization. * * * " Since the adoption of this amendment, therefore, the United States citizenship has been placed on an independent basis by making the conditions upon which it rests entirely independent of state control. The result of the Fourteenth Amendment is not only to make such persons described citzens of the United States but *ipso facto* of the state wherein they reside If the residence within a state, which is required in order that one may become a citizen of the state, need not be confirmed by the state, it follows that the federal constitution determines who may become such citizens."

THE CONTROL OF SUFFRAGE.—The provisions in the federal constitution bearing upon aliens are few and mostly indirect. It is provided that the president and vice-president must be natural born citizens,[69] that a senator must have been a citizen for at least nine years, and a representative for seven.[70] The regulation of elections, including the prescribing of qualifications for suffrage, is left to the states, except for the provisions which have already been noted and for the limitations contained in the Fourteenth and Fifteenth Amendments. The second section of the Fourteenth Amendment providing that if any state denies the right to vote to a citizen of the United States, above the age of twenty-one years, except for participation in rebellion or other crime, its representation in Congress shall be reduced in proportion to the number of citizens so disfranchised compared with the whole number of adult male citizens, does not confer the right of suffrage upon any person, nor affect the power of the states to determine who may vote within their limits.[71] The states, then, controlled the suffrage before the present national government was established and still retain the power to do so, free from federal control or supervision, except as noted; that is, they may determine for themselves the nature of their political privileges and who may exercise them. Thus, for instance,

[69]Art. II., sec. 1, cl. 4.
[70]Art. I., sec. 3, cl. 3, and sec. 21 cl. 2.
[71]10 Cyc. 572; *Van Valkenburg v. Brown*, 43 Cal., 43.

the states determine the qualifications of voters, and are the judges of such qualifications, as well as the time, place, and manner of holding elections. That one has federal citizenship does not entitle one to the privileges of state suffrage or qualify him to hold public office.[72] It follows, therefore, that a state may grant its potitical privileges to aliens, if it so wishes.

The provisions of the federal constitution[73] do not give Congress any power to prescribe the qualifications of voters at elections of members of Congress, but they do give power to regulate the time, place and manner of conducting such elections, and this power has been used. This general principle of the state control of suffrage was not changed by the Fifteenth Amendment, but the power of the state to withhold the suffrage is there subjected to restriction.

While the states may confer political rights upon those who are not citizens of the United States,[73] such state citizenship does not necessarily confer the right of suffrage; nor is the right to vote a necessary incident of citizenship, and when an unnaturalized foreigner is given the right to vote he is not thereby made a citizen,[74] tho the courts of Wisconsin and Louisiana have held that a person who, by the constitution of their states, is an elector is also a citizen thereof, even if not a citizen of the United States.[75] On the other hand, the Circuit Court of Appeals has decided[76] that as regards the jurisdiction of the federal courts, a person who has merely declared his intention to become a citizen is an alien, although he may have voted for members of Congress and for state and county officers conformably with the constitution and laws of the state wherein he resides.

In the Slaughter House cases it was held that the privileges and immunities guaranteed to "the citizens of the several states," by the Fourteenth Amendment, are those arising out of the fundamental character of the federal government, while the privileges and immunities of citizens of the states exist rather by the prin-

[72]*Minor v. Happersett*, 21 Wall., 178.

[73]Art. I., secs. 2, 3, and 4.

[73a]Under section 2166 R. S., providing that any alien over the age of twenty-one who has been honorably discharged from the army may become a citizen after one year's residence, without any previous declaration of intention, an alien who has been so discharged is not entitled to vote unless he has been naturalized, since the statute only exempts him from making the preliminary declaration. *Berry v. Hull*, 6 N. M., 643.

[74]*Lang v. Randell*, 4 Dill., 425; *In re Wehlitz*, 16 Wis., 443.

[75]See, in addition to the Wisconsin case *supra*, *State v. Abbott*, 41 La., Ann., 1096.

[76]56 Fed. Rep., 576.

ciples of the common law, than by any positive enactment. As the fundamental rights referred to in the federal constitution are civil and not political, each state may regulate for itself and according to its own ideas of public policy the general qualifications for holding office and for exercising the electoral franchise. In most of the states the latter right is restricted to citizens, for aliens, though residents, are presumed not to be acquainted with the form of government and its policy to such an extent as to enable them to have a permanent interest in its welfare.[77] When a state constitution confers the franchise upon "inhabitants" and "residents," these terms have been interpreted as being impliedly limited to such persons as are citizens.[78]

As a general rule, found in all representative governments, only electors can be elected to office; and whatever other qualifications or disqualifications may be specified, every person who is voted for must at all events possess the qualifications and be free from the disqualifications which attach to the character of an elector.[79] In the case of *Walther v. Rabolt*,[80] Judge Sanderson said: "If they (aliens) desire to secure political rights, they must cease to be aliens and become citizens in the mode prescribed. Until then they cannot vote nor hold office. They can neither choose nor be chosen, for that is to exercise political power; and they are not of the people who alone may exercise it."

The political rights of the inhabitants of the territories rest in the discretion of Congress.[81] The policy of Congress has been to prescribe the qualifications of electors at the first election after the organization of a territory, and thereafter to allow the legislative assembly of the territory, under certain restrictions and limitations, to regulate and fix the qualifications for the exercise of the franchise and for holding office. Congress does not thereby cease to have power to legislate directly on such matters if it chooses to do so.[82] In recent years all the organic acts of the territories

[77]*Cook v. State*, 90 Tenn., 407.

[78]See the Massachusetts Constitution of 1780, Art. II., sec. 2, cl. 1, and the Opinion of the Justices, 7 Mass., 523, and 122 Mass., 591. For a contrary holding, see *Spragins v. Houghton*, 3 Ill., 377; *Stewart v. Foster*, 2 Binn., 110; *McCarthy v. Froelke*, 63 Ind., 507.

[79]Throop, Public Officers, sec. 72.

[80]30 Cal., 185.

[81]*Murphy v. Ramsey*, 114 U. S., 15; *Innis v. Bieton*, 2 Idaho, 442.

[82]*People v. State Comrs.*, 7 Utah, 279; 22 Stat. 30 and 24 Stat. 635.

have limited the rights to vote and to hold office to citizens or to those who have declared their intentions to become citizens.[83]

We have seen in this chapter that in ancient and mediaeval times an alien had little or no protection from the laws of the country in which he sojourned, while in modern times most states tend to give him full civil rights. In England, the common law disability as to holding real estate has been swept away, and in most of our states the same result has been attained. How it is in the territories will be shown in subsequent pages.

We have also seen how citizenship arose in the colonies and how, with the birth of the new federal state, there arose a national as well as a state citizenship. We have seen that the citizenship of these two sovereignties is distinct; that the control of the suffrage is left almost entirely to the states and territories; and finally, that the states may confer state citizenship and political rights upon aliens. So may the territories confer, under Congressional authority, the latter rights.

[83]The regulation of jury service has likewise been left by Congress to the territorial legislatures since 1836. It has been held that discrimination on the part of a territorial law against a person in the matter of jury service on account of alienage is not prohibited by the Fourteenth Amendment. *State v. Ah Chew*, 15 Nev., 50.

II. Federal Legislation: Shipping, Patents, Trade Marks and Copyrights

In our federal system of government, the regulation of ordinary civil and political rights falls within the province of state, not national government. We must, therefore, look to state legislation and not to national for most of the statutory control exercised over aliens. Congress has general control over the territories, however, and has passed legislation in regard to shipping, patents, copyrights, trade-marks, public lands, and some miscellaneous matters, that affects aliens whether resident in the states or in the territories.

Shipping.—After the War of Independence Great Britain enforced against the United States a modification of her shipping policy in force with her colonies. The modification was to the disadvantage of the states, however, for while she allowed the products of her dependencies to be brought directly to this country and the products of this country to be carried back directly to them, she required that both operations should be carried on exclusively in British ships, to the consequent exclusion of American shipping from the transportation of even American products.[1]

The federal constitution gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This power is exclusive and paramount. In accordance with it, Congress has passed many laws regulating shipping and navigation, and prescribed the conditions under which vessels might enroll so as to secure the benefits of American registry.

The first act on this subject was that of September 1, 1789,[2] for "Registering and Clearing Vessels, Regulating the Coasting Trade," etc. It provided that only vessels built within the United States, and belonging wholly to citizens thereof, or, if not built wholly within the United States, belonging to a citizen on May 16, 1789, and of which the master is a citizen of the United States, might be registered and deemed to be a vessel of the United States,

This is the second of a series of four papers, the first of which may be found *ante* p. 493.

[1] An. of C., I, 314.

[2] I. Stat., 55.

and entitled to the benefits of such.[3] Section 5 of this act of 1789 provided that no ship owned by any citizen of the United States usually residing in any foreign country should, during the time the owner continued to reside abroad, be deemed a vessel of the United States and entitled to registry, unless the owner was an agent or partner in some house consisting of citizens of the United States, carrying on trade in the said states.[4]

The provisions of the above act were reenacted in the law of December 31st, 1792.[5] The policy of this legislation was taken from the British enactments regarding shipping where it had been the declared policy for a long time, being embodied in 3 and 4 Wm. IV., chs. 54 and 55, entitled "An Act for the Encouragement of British Shipping and Navigation." It would seem that there was practically no discussion with regard to the policy in the early sessions of Congress, the British experience doubtless being accepted without question in the matter.

By the act of February 18, 1793,[6] providing for enrolling and registering vessels for the coasting trade and fisheries, the requirement is made that the owner and master should be citizens of the United States.[7]

By the act of March 27, 1804,[8] no ship or vessel was to be entitled to registry as a ship of the United States, if owned by any person naturalized in the United States and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless in the capacity of consul or other public agent of the United States. The provisions of this act, embodied in section 4133 R. S., were repealed March 3, 1897.

In the case of *United States v. Gilles*,[9] the court declared that an American vessel did not lose her character as such by the fact that her master, a native born citizen of the United States, had married and resided in a foreign country. In the case of "The Frances,"[10] however, it was held that a naturalized citizen who returned to his native country for purposes of trade, though intending to return

[3]The substance of the foregoing is embodied in Section 4131 R. S., as amended May 28, 1896, while Section 4132 R. S., makes provision for vessels captured in war, and for vessels the part ownership of which lies in foreigners.

[4]Repealed March 3, 1897—29 Stat. 687.

[5]I. Stat. 287.

[6]1 Stat. 305.

[7]"The Schooner Two Friends," 1 Gall 118. Section 4377 R. S. provides that if a licensed vessel is transferred in whole or in part to a person who is not a citizen or resident in the United States, it is subject to forfeiture.

[8]2 Stat., 296.

[9]Pet., C. C. 159, 1815.

[10]8 Cr., 335.

again to his adopted country, but who continued in the former country a year after the breaking out of war, for the puprose of winding up his business, had gained a domicile in his native country and his goods were therefore subject to capture and condemnation.[11]

By the act of March 12, 1812,[12] it was provided that a steamboat employed exclusively on a river or bay of the United States, and owned in whole or in part by an alien resident within the United States, might be registered the same as if it belonged to a citizen of the United States. This was reenacted in section 4316 R. S.

During the progress of the Second War with Great Britain, the act of March 3, 1813,[13] provided that after the war only citizens of the United States, (or persons of color, natives of the United States), should be employed in the public or private vessels of the United States. No naturalized citizen was to be employed unless he exhibited a certified copy of the act by which he had been naturalized. This was not intended to prohibit the employment of foreign seamen in American vessels while these were in foreign ports, in order to supply a temporary deficiency; and the act was not to apply to nations which had not made similar discriminations against us.

The act of March 1, 1817,[14] restricted the importation of merchandise to vessels of the United States or to such foreign vessels as belonged to the citizens or subjects of that country of which the goods are the products. Likewise, this regulation was not to extend to the vessels of nations which had not adopted similar regulations with regard to us. It was superseded by the act of February 17, 1898. The act further provided that no merchandise should be imported from one port of the United States to another in a vessel belonging in whole or in part to a subject of any foreign power. This was re-enacted in Sec. 4347 R. S.

The first act relating to tonnage duties was that of July 20, 1789.[15] It imposed on ships built within the United States and belonging wholly to citizens thereof, a duty of six cents per ton; on ships thereafter built in the United States, but belonging wholly or in part to subjects of foreign powers, thirty cents per ton; on all other ships, fifty cents per ton; and on foreign ships engaged in the coasting trade, fifty cents per ton. An additional duty of 50 cents per ton was levied upon foreign ships under the denomination of

[11]See The Dos Hermanos, 2 Wheat, 76.
[12]2 Stat. 694.
[13]2 Stat. 809.
[14]3 Stat. 351.
[15]1 Stat. 27, repealed July 20, 1790.

"light-money" by the act of March 27, 1804.[16] By section 4219 R. S. this is made to apply to American registered ships upon which any officer is not an American citizen.

When the act of July 20, 1789, came up for discussion in Congress, it was stated that the small discrimination in tonnage duties was made with the object of partially correcting such inequalities in our navigation and trade with foreign nations as prevailed.[17] In the following year (May 10, 1790) it was stated by Mr. Sherman that the measure had in view two objects—one the building up of our carrying trade, the other, encouragement of ship-building. At the same time, the necessity of retaliating against foreign discriminatory duties was pointed out.[18]

In the act of 1817 (*supra*) provision was made for a diminution of tonnage duties in the coastwise trade when three-fourths of the crew should be American citizens; and a duty of fifty cents per ton was levied on vessels of the United States engaged in the foreign trade, unless two-thirds of the crew should be American citizens. This provision was repealed by the act of June 28, 1864.[19] On May 31, 1830,[20] tonnage duties were abolished on vessels of the United States of which the officer and two-thirds of the crew should be citizens of the United States, and likewise, on the vessels of such foreign nations as maintained no discriminatory duties against us. This, likewise, was repealed by the act of June 28, 1864.

Section 4219 R. S. provides a tonnage duty of thirty cents per ton on vessels built within the United States but belonging to foreign subjects and on other vessels not of the United States fifty cents per ton; on all foreign vessels coming from any place to which our vessels are not ordinarily permitted to enter, two dollars per ton; and upon vessels not of the United States which should be entered in one district from another district, having on board goods taken in one district to be delivered in another, fifty cents per ton. In addition to these tonnage duties, a tax of thirty cents per ton is levied on vessels from any foreign place, and any vessel containing an officer not a citizen of the United States is subject to a further tax of fifty cents a ton.

Section 4220 R. S. exempts vessels belonging to citizens of the United States and engaged in coasting or fishing from tonnage taxes

[16] 2 Stat. 299.
[17] An. of C. I., 335*a*.
[18] An. of C. II, 1560.
[19] 13 Stat. 201.
[20] 4 Stat. 425.
[21] Act July 14, 1870, 16 Stat. 269.

and duties, if such vessels are duly licensed, registered, or enrolled.[21] The acts of June 19, 1886,[22] and February 17, 1898,[23] prohibit foreign vessels from transporting goods or passengers from one port of the United States to another either directly or by way of a foreign port.

In lieu of the duties exacted in the foregoing sections, the act of June 26, 1884,[24] imposes a duty of four cents a ton on vessels from foreign ports on or adjacent to the American continents, and a duty of six cents on those from any other foreign port. The act of June 19, 1886,[25] provides for the abolition of tonnage taxes and light-house dues upon terms of reciprocity, and section 4228 R. S. provides for the suspension of discriminatory duties against the vessels or goods of any foreign nation when the president shall have been notified that such foreign nation has suspended or abolished its discriminatory duties against us.[26]

It has been stated that the policy of the United States, respecting commercial relations with other nations, has always been to offer to all nations, and to ask from them, entire reciprocity. Congress has never made discriminating duties except as an inducement to other nations to modify or repeal their restrictions upon commerce and navigation.[27]

The act of 1864(*supra*),repealing the act of 1830 which abolished tonnage dues on vessels of the United States of which the officers and two-thirds of the crew should be citizens of the United States, provided, however, "That officers of vessels of the United States shall in all cases be citizens of the United States." The policy of such legislation was well brought out in the case of "The Dubuque."[28] Here the court said that the registration laws had for their object, among other things, the building up and fostering a commerce purely American. With this object in view, great importance has been attached, and justly so, to the provision in regard to the designation of the master and his political status. The owner is required

[22]24 Stat. 81.
[23]30 Stat. 248.
[24]23 Stat. 57.
[25]24 Stat. 82.
[26]That statutes on the subject of tonnage duties are subject to modification by treaty provisions and the reciprocal laws of the countries to which such vessels belong, see *U. S. v. Hathaway*, 3 Mason 324; and *North German Lloyd Co. v. Hedden*, 43 Fed. Rep., 17.
[27]There is no provision in our laws preventing foreign built vessels from being purchased, owned, and navigated by citizens of the United States, though they are not entitled to registry or to enrollment and license as American vessels, because not built in the United States.—"The Conqueror" 166 U. S., 110
[28]2 Abbott D. C., 1870

to make oath as to who is the master and as to his being a citizen of the United States, and the master himself, if within the district at the time of application for registry, must himself take oath as to citizenship.[29]

By the act of April 7, 1874, an alien who had declared his intention and who had been a permanent resident of the United States for six months prior to the granting of such license might be licensed, as if already naturalized, to serve as an engineer or pilot upon any steam vessel of the United States. Thus, as the law stood prior to the act of June 26, 1884,[30] two classes of persons were competent to receive licenses as engineers or pilots on American vessels, namely, citizens, and aliens who had declared their intention and had resided permanently in the United States for six months prior to the granting of the license. The amendatory act of 1884 did not affect either of these two classes but made provision for a third class of persons who might be officers under peculiar circumstances and for brief periods. That is, it provided that aliens, whom the law excluded from general and permanent employment on United States vessels, might be allowed to fill vacancies in the position of officers below that of master, temporarily and in emergencies.[31]

The act of May 28, 1896,[32] amending R. S. 4131, continues the requirement of citizen ownership and specifies that all the officers having charge of a watch, including pilots, shall in all cases be citizens of the United States, either native born or those whose naturalization shall have been fully completed. This requirement was not, however, to repeal the provision of the act of 1884 regarding temporary vacancies below the grade of master.

A tax on a vessel employing an alien mate, imposed under section 4219 R. S., saying that a "vessel, any officer of which shall not be a citizen of the United States, shall pay a tax of fifty cents per ton," should not be remitted because such alien had declared his intention of becoming a citizen of the United States and had for more than three years served continuously on board an American merchant vessel, but had never actually been admitted to citizenship.[33] A vessel used exclusively for pleasure is not, however, subject to such duties.[34] By the amendatory act of June 19, 1886,[35] it was stated that the exemption noted above should not apply to

[29]Also *Adams v. "The Wyoming,"* 2 N. J. L. J., 275
[30]23 Stat. 53.
[31]21 Op. A.-G., 166.
[32]29 Stat. 188.
[33]21 Op. A.-G. 412.
[34]18 Op. A.-G. 564.

any yacht built outside of the United States and owned or used by a citizen of the United States.

Thus it is seen that full citizenship is required in order that one may be an officer, in permanent employment, on an American vessel. If a foreign seaman declares his intention and serves three years on board a merchant vessel subsequent to such declaration, he is to be deemed a citizen for the purpose of protection as an American citizen. This is not full citizenship, however, and before he can become an officer this alien seaman must comply with the conditions necessary to make him a citizen for all purposes whatsoever.[36]

PATENTS.—Under the clause of the constitution giving Congress the power "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," Congress may grant patents for inventions and may make all laws necessary and proper for carrying such express grant of power into execution.[37]

The early patent laws were in imitation, for the most part, of the system prevailing in Great Britain.[38] By the first act passed on the subject, April 10, 1790,[39] patents might be granted to "any person." In the next law on the subject, February 21, 1793,[40] the right was restricted to persons "being a citizen or citizens of the United States." In explaining the reason for this restriction it was stated in the debate in the House that the object was to prevent foreigners from obtaining patents in this country for inventions upon which they had already secured patents in Europe, for this would prevent American citizens from obtaining patents for the same or similar inventions.[41] The privilege was again extended by the law of April 17, 1800,[42] which provided "that * * * the rights and privileges given to citizens of the United States, respecting patents for new inventions, etcetera, shall be extended to aliens who, at the time of petitioning, shall have resided for two years within the United States."

In the case of *Shaw v. Cooper*[43] the court said: "The counsel seems to consider this point of great importance, as the plaintiff was an alien, when the first patent was obtained, but had become

[35]24 Stat. 81.
[36]17 Op. A.-G 534; 23 Op. A. G., 403.
[37]*U. S. v. Bell Tel. Co.*, 128 U. S., 358; *U S. v. Duell*, 172 U. S., 583.
[38]An. of C., 2d ses., 855.
[39]1 Stat. 109.
[40]1 Stat. 318.
[41]An. of C., 2d C. 855.
[42]2 Stat. 37.
[43]7 Pet., 292.

naturalized before the date of the second; and consequently, that this right under the second patent cannot be governed by the law applicable to aliens. As the inquiry on this head is, whether the second patent has relation to the first, it is not necessary to look into the laws to ascertain the respective rights of aliens and citizens on this subject. In regard to the right of the patentee to surrender a defective patent, and take out a new one, there can be no difference between a citizen and an alien. * * * It would seem, from the above provisions, that citizens and aliens, as to patent rights, are placed, substantially, upon the same ground."

The next important modification of the law was made by the act of July 13, 1832,[44] by which the provisions of the act of 1800 were extended "to every alien who at the time of petitioning for a patent shall be resident in the United States, and shall have declared his intention according to law to become a citizen thereof." In explaining this measure, Mr. Taylor stated in the House on January 6, 1832,[45] that the first patent law, that of 1790, extended the same privilege to aliens as to citizens, following in this respect the British precedent. By the act of 1793 these privileges were restricted to citizens; by that of 1800 they were extended to aliens who had resided two years in this country, on their making oath or affirmation that such invention or discovery had not before been made in this or any other country, in this respect making a difference between the alien and citizen, the latter being required to swear only that he was the first inventor. Since the passage of this law of 1793, at least seventeen acts had been passed dispensing with the provision requiring two years residence and authorizing the issuing of patents where the petitioner was a resident here at the time of his application. To make such repeated private acts unnecessary was the object, Mr. Taylor stated, of the bill that the presented. It authorized the issuing of patents where the applicant was at the time a resident of the United States, had complied with the naturalization laws by declaring his intention to become a citizen, and had further complied with the act of 1793 by swearing that his invention or discovery had not been made before in this or any other country.

The act of July 4, 1836,[46] discriminated against aliens in the matter of fees. A citizen, or one who had declared his intention to become such, was required to pay a patent fee of $30; an alien, if an inhabitant of Great Britain, $500; if of any other country,

[44] 4 Stat., 577.
[45] Cong. Deb. 8, 1500.
[46] 5 Stat., 117.

$300. An alien patentee was also compelled to "put, and continue on sale to the public on reasonable terms the invention or discovery for which the patent is issued."[47] This discrimination in regard to fees was opposed both in the House and Senate. In the latter, it was argued that new inventions were desirable for the country, therefore the patent privilege should be extended to all without any discrimination.[48] In reply to this the argument was advanced (based on a report from the Secretary of State) that the fees should be increased so as to discourage the flood of applications for useless inventions. As to foreigners, it was said that Congress had heretofore legislated for each individual case, but that it was now proposed to enact a general law applicable to all in the future. As to the amount of fees exacted of foreigners it was contended that while high, as compared with those required of citizens, they were not so high as those prevailing in some foreign countries. (*Ibid*).

This discrimination in fees was continuously protested against by alien residents until its repeal March 2, 1861,[49] as to those countries which did not discriminate in such matters against us. The act of 1836 also denied to aliens who had not resided in the United States one year and made a declaration of their intention to become citizens, the right to file caveats for the protection of their immatured inventions. This was repealed by the act of July 8, 1870,[50] which gives to aliens, who have resided in the United States a year preceding the filing of a caveat, and have made oath of intention to become citizens, the same privileges in this respect as are enjoyed by citizens. In the case of *Thomas v. Reese*[51] the commissioner declared: "The law makes no discrimination between citizens and foreigners as applicants in the patent office. * * * An invention made in the United States by a foreigner stands on the same footing in the patent office of the United States, as an invention made in the United States by a citizen. An invention made in a foreign country by a citizen of the United States stands on the same footing in the patent office as an invention made in a foreign country by a foreigner."

[47]"To put into market" was interpretted to mean to be willing to sell at a reasonable price.—*Tatham v. Lowber*, 2 Blatch., 49. In the same case the court held that an American assignee of an alien inventor is not within the clause of the act of 1836 requiring the patentee, if an alien at the time the patent was granted, to put and continue on sale the invention for which the patent issued; that clause applied only to an alien patentee.

[48]Mr. Dickerson, Cong. Deb., VI., 378.

[49]12 Stat. 246.

[50]16 Stat., 203; 4902 R. S.

[51]17 Pat. Off. Gaz., 1880.

This was reaffirmed in *Ex Party* Nagel[52] where it was again said: "The law makes no distinction between citizens and foreigners in the patent office; but it makes a wide distinction between inventions made in the United States and those made in a foreign country, whether made by citizens of the United States or by foreigners."

Section 4892 R. S. requires that the applicant for a patent shall state of what country he is a citizen. In *Child v. Adams*[53] it was held that a false oath as to citizenship renders the patent void; but in *Tonduer v. Chamberset*[54] the court said: "At any rate, the citizenship of the applicant for a patent is no longer a matter of any real importance (that is, since the act of 1870), and a mistake touching the same is harmless."[55]

It looks almost like excessive liberality to grant foreigners the benefits of our patent laws upon the same basis as citizens without any discrimination in fees or other exactions, and without the foreigner being compelled in any way to obtain the protection of his home government by treaty stipulations, or otherwise. Commenting upon the extreme liberality of our laws, it has been said: "A single restriction which has sometimes been regarded as a discrimination against the alien exists in the patent laws of the United States. It is that provision of the statute whereby the term of a patent for an invention which has been previously patented abroad is made to expire with the expiration of the foreign patent, or if there be more than one, with the term of that having the shortest time to run. This, however, is not in fact a discrimination against a foreigner, since it applies equally to the citizen, and has been made effective by the courts to terminate the patent rights of citizens. It amounts to the claim by the United States, on behalf of her own people, that the invention shall become the property of the public here when permitted to become so elsewhere. This is undoubtedly just in theory, and the same provision is found in the patent laws of nearly every American nation."[56]

TRADEMARKS.—Alien friends are entitled, under the laws and the constitution, to the same protection of their rights as are citizens. Judge Woodbury says:[57] "Comity and courtesy are due to

[52]17 Off. Gaz., 198.
[53]1 Fish. Pat. Cas., 189.
[54]37 Fed. Rep., 333.
[55]That a foreign patentee may take out an American patent unless his invention has been in public use in this country for two years, see *Henry v. Providence Tool Co.*, 3 Bann. and A, 510; 14 Off. Gaz., 855.
[56]51st Cong. Sen. Exec. Doc. vol. 8, 57.
[57]*Taylor v. Carpenter*, 2 Wood. and M. 1.

all alien friends, rather than imposition and pillage. To take their marks and use them as and for our own, and to their damage, is like praying on a visitor, or inhospitably plundering a ship on shore.''

The entire legislation of Congress in regard to trade marks originated as recently as July 8, 1870, in ''An Act to Revise, Consolidate, and Amend the Statutes Relating to Copyrights.''[58] This statute provided for the registration in the patent office of any device in the nature of a trademark to which any person has, by use, established an exclusive right, or which the person so registering intends to appropriate to his exclusive use; and it makes a wrongful use of a trade mark so registered by any other persons, without honest permission, a cause of action in a civil suit for damages[59]

An act supplementary to the above was passed Aug. 14, 1876[60] ''to punish the counterfeiters of trademark goods and the sale or dealing in counterfeit or trademark goods.'' This act provided for the punishment by fine and imprisonment of the fraudulent use, sale, and counterfeiting of trademarks registered in pursuance of the statutes of the United States. It will be noticed that this penal act of 1876 refers only to trademarks registered ''pursuant to the statutes of the United States.'' The right to property in trademarks and the civil remedies for their protection exists at common law and does not depend upon the act of Congress for their enforcement. In our system of government this property in trademarks rests on the laws of the different states and, like the great body of rights, both of person and of property, depends on the laws of the states for its security and protection.

When, therefore, the validity of the general act of 1870 and of the penal act of 1876 were questioned in the ''Trademark Cases''[61] the court declared that a trademark was neither a patent nor a copyright, and that Congress had no power to pass such a statute as to an ordinary trademark existing by common law rights. The court said: ''It is therefore, manifest that no such distinction is found in the act, but that its strong purpose was to establish a uniform system of trademark legislation for the benefit of those who had already used a trademark, or who wished to adopt one in the future,

[58]16 Stat. 198.

[59]Mr. Browne, in his work on ''Trademarks'' (2d ed., p. 28), says that the promoters of this act had very little knowledge of the principles of the common law and not the slightest regard for the constitution; that they did not perceive what part of the constitution was applicable to the measure. ''By a very great blunder it was classed with inventions and authorship and sandwiched in between patent law and copyright law in the same chapter.''

[60]19 Stat., 141.

[61]100 U. S., 82, 1879.

without regard to the character of the trade to which it was to be applied or the residence of the owner, with a solitary exception that those who reside in foreign countries which extended no such privileges to us were excluded from them here.'' Then continuing the court said: ''If that act (the act of 1870) is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment (that of 1876) intended to protect that right, falls with it.''

It would seem that this act of 1876 was not intended to be declared unconstitutional of itself, and it was virtually reenacted by Congress in passing the supplement to the Revised Statutes on June 7, 1880. The present registration act is that of March 3, 1881.[62] It is drawn under the commerce clause of the constitution—the only one that is sufficiently broad to make its constitutionality beyond question. That an act, on this subject, to be constitutional must not interfere in any way with the domestic commerce of a state was pointed out by the court (*supra*) in these words: ''When, therefore, Congress undertakes to enact a law which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations or among the several states, or with the Indian tribes. If not so limited, it is in excess of the powers of Congress.''

The act provides that the owners of trademarks used in commerce with foreign nations, if such owners shall be domiciled in the United States, or located in a foreign country which affords similar privileges to citizens of the United States, may register their trademarks.[63] Jurisdiction of all cases arising under this act is given to the federal courts irrespective of the citizenship of the party.[64] As soon as the general act of 1881 became a law, the penal act of 1876 immediately came into full vigor and operation again. Under this law of 1881, citizenship is not requisite to the obtaining of the privileges of trademark registry. In *Taylor v. Carpenter*[65] the court says: ''First, it is suggested that the plaintiffs are aliens. Be it so. But in the courts of the United States, under the constitution and laws, they are entitled, being alien friends, to the same protection of their rights as citizens. * * * There is no difference between the case of a citizen and that of an alien friend where

[62]21 Stat., 502.
[63]Sec. 4937 R. S.
[64]17 App. Cas. D. C., 478.
[65]3 Story, 458.

his rights are openly violated. * * * So far as the subject matter of this suit is concerned, there is no difference between citizens and aliens.'' Again, in the case of *La Croix v. May*,[66] the court said: ''The fact that the complainant is an alien does not affect his right of property in a trademark; but that fact, as it establishes the requisite diversity of citizenship, between the parties to confer jurisdiction upon this court, is indispensable to the cause of action alleged. The act of Congress fortifies the common law right to a trademark by conferring the statutory title upon the owner; but as was said of a former act, property in trademarks does not derive its existence from an act of Congress.''

While it is a general rule that ''there is no difference between citizens and aliens'' as to the right of acquiring a trademark, it has been held that a foreigner has no common law right to a trademark in the United States, as against a citizen who has adopted a similar mark in good faith before the alien has sold any goods in this country.[67] In the case of *Coffeen v. Brunton*,[68] the court said: ''It has been stated by Judge Story that where one of our own citizens fraudulently uses the mark of a foreigner to recommend an article of domestic manufacture, he is liable to an action. In this respect there is no difference between a citizen and an alien.'' But a trademark acquired in this country will not support an action for acts committed wholly in a foreign country, for this would be to extend the laws of this country beyond its borders.[69] An action will lie, however, where the right was acquired in this country and the wrongful transactions emanated from here, though they were carried out in foreign countries. In such a suit the boundaries of the dealing and not of the countries constitute the limits of investigation.[70]

Our country has entered into treaties with foreign states, from time to time, to protect the trademark rights of citizens of the one country in the other. All such treaties were abrogated in 1887 when the United States entered into an international convention with various nations for the purpose of regulating this subject.[71] This convention providing for the protection of industrial property contains the following provision: ''The subject or citizen of each of the contracting states shall enjoy in all the other states of the union,

[66]15 Fed. Rep., 236.
[67]*Richter v. Anchor Remedy*, 52 Fed. Rep., 555.
[68]4 McLean, 516.
[69]*Vacuum Oil Co. v Eagle Oil Co.* 122 Fed. Rep., 105.
[70]*Wyckoff v. Howe Scale Co.*, 110 Fed. Rep., 520.
[71]Trademark Rec., Aug. 16, 1893; 26 Stat. 1376; 39 Pat. Off. Gaz., 960; Hopkins ''Unfair Trade,'' 374.

so far as concerns the commercial marks and the advantages that the respective laws accord to citizens, the same protection as the latter and the same legal recourse against all infringements of their rights, if they comply with the formalities and conditions imposed on subjects or citizens by the domestice legislation of each state.''

The courts take judicial notice of treaties between this government and foreign governments, and therefore, a citizen of a foreign government can sue here to protect his duly registered trademark without alleging such treaty rights.[72] Such treaties secure to the alien, however, only such treatment as our own citizens receive.[73]

COPYRIGHTS.—Before the existence of the present federal government all but one of the original states had enacted laws to secure the rights of authors. There also existed at common law, a complete property in unpublished works, and there is no principle, independent of a statute, by which the same protection would not also include published works.[74]

As a general statement, then, an author's property in an unpublished work stands upon the same basis as any other kind of property. For this reason, the common law protection extends to the intellectual production of an alien as well as a citizen. In *Palmer v. DeWitt*,[75] the court says: ''The alienage of the author is no obstacle to him or his assignee in proceeding in our courts for a violation, or to prevent a violation of his rights of property in his unpublished works.'' A monopoly of such property, however, is secured only as a result of legislative enactment. Such enactments are embodied in our copyright laws.

From the time the first federal statute on the subject was enacted, May 31, 1790,[76] until 1904, twenty-five public and nine private acts were enacted relating to copyrights. The purpose of these copyright laws, from the time when the first act confined the benefits to ''citizens of the United States or residents therein,'' down to the enactment of the international copyright act of 1891, was to encourage native talent and to protect American authors and artists only.[77] The phrase ''or resident therein'' has been interpreted to mean a permanent inhabitant; temporary residence has not been deemed sufficient. The filing of a declaration of intention to become a citizen was also held not to be sufficient to make a transient visitor

[72]*La Croix Fils v. Sarrazin*, 15 Fed. Rep., 489.
[73]See 74 Fed. Rep., 222.
[74]Drone on Copyrights, p. 47.
[75]47 N. Y., 532.
[76]1 Stat., 124.
[77]*Yuengling v. Schile*, 12 Fed. Rep., 97.

such a citizen.[78] In the case of *Yuengling v. Schile* (*supra*) the plaintiff took out a copyright on a print, as proprietor, he being a citizen of the United States, the print having been designed by an alien in Europe and printed there. Yuengling had no title derived from the author. He could not, therefore, lawfully obtain a copyright for the print under our statutes.[79] The author not being a citizen or resident of the United States, could not obtain a copyright as author, and therefore could not as proprietor.

There is nothing in our laws to prevent one, securing a copyright, from assigning it to an alien under an agreement made either before or after the composing of the work.[80] The assignee of a non-resident alien author, inventor, or designer, is entitled, however, to United States copyright only under the provisions of the international copyright act. But the assignor may assign to a non-resident foreigner. In the case of *Black v. The Allen Co.*,[81] it was said: "It will not, probably, be seriously denied that a citizen of the United States , who is the owner of a copyright, can assign the whole of such copyright to a foreigner."

Almost from the beginning of our national history, the policy of extending the benefits of our copyright laws to authors and inventors of foreign countries, at least upon terms of reciprocity, had been advocated. The first serious proposal to that effect seems to have been made when Henry Clay, in 1837, after presenting an address to Congress from a number of distinguished British authors, asking for such protcetion, said in the Senate:[82] "The signers of this address may, with more confidence, indulge the hope of the passage of a law which they solicit, from the consideration that according to the liberality of the British practice, the securing of copyright is not restricted to British subjects, but is equally enjoyed by foreigners, and I understand that there are instances of American authors who have availed themselves of it." About the same time, a petition signed by many American authors was presented to Congress asking for a change in the copyright laws such as would insure to authors a safer interest in their property, and would lay the ground "for a future international law of copyright between the Old World and the New."[83]

The Clay report was presented to the Senate on the 16th of

[78]*Carey v. Collier*, Fed. Cas. No. 2400
[79]2952 R. S.
[80]*Corte v. Evans*, 27 Fed. Rep., 861.
[81]42 Fed. Rep., 618.
[82]Cong. Deb. XIII., 670.
[83]Cong. Deb. XIII., pt. 2, 248, App.

February, 1837.[84] "We should be all shocked if the law tolerated the least invasion of the rights of property in the case of the merchandise (imported), while those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws." The committee then urged that the same principle of protection which had been extended in the case of patents to foreigners should also be extended in the case of copyrights. "In relation to the subjects of Great Britain and France, it will be but a measure of reciprocal justice; for, in both of those countries, our authors may enjoy that protection of their laws for literary property which is denied to their subjects here." The bill brought in by the committee limited its benefits to the subjects of Great Britain and France. "But, in principle, the committee perceived no objection to considering the republic of letters as one great commonwealth and adopting a system of protection for literary property which should be common to all parts of it." The bill recommended by the Clay committee was ordered to be printed but no further action was taken regarding it.

From the time Clay introduced his measure until the law of 1891 was passed, many petitions and resolutions were presented to Congress and at least nineteen bills were introduced looking to the enactment of an international copyright law. President Harrison, in his message to Congress of December 3, 1889, said: "The subject of an international copyright has been frequently commended to the attention of Congress by my predecessors. The enactment of such a law would be eminently wise and just." And again in the message of December 1, 1890, there was a paragraph favoring "legislation affording just copyright protection to foreign authors on a footing of reciprocal advantage for our authors abroad."

About the same time, Charles Dudley Warner and many other American authors besought Congress to enact an international copyright law. Mr. Warner submitted a report on the subject to Congress, October 30,, 1889, in which it was said:[85] "But the most glaring relic of ancient times of ignorance and exclusiveness, when governments little considered the broad principles of universal justice, is copyright laws which protect only the owner or resident in a country and permit its citizens to appropriate to their own profit in their factories the property of aliens. The origin of such legislation must have been in times when men thought it no part of their duty to protect strangers and foreigners."

[84]24th Cong. 2 sess. S. R. No. 179.
[85]Sen. Exec. Doc., vol. 8, No., 57.

Favorable action was not taken by Congress until the year 1891. The debates which took place in that year were full and informing. In these debates but little reference is made to the resident alien; the effects of foreign competition, or the protection which would be afforded American auth rs in foreign countries is chiefly considered.[86] Mr. Breckinridge,[87] (after arguing that there was no reason why the product of one's brain should be allowed to be filched from him any more than his material property is) said: "It is not a question of reciprocity, it is a question of the decalogue. Shall we give the foreigner that protection of his property, as to his brain, that we do to every other form of property that the foreigner brings to us?" And Mr. Farquhar, also of the House, remarked[88]: "Now, this bill is thoroughly reciprocal. No individual belonging to any nation can derive any benefit from this law unless that nation stands on the same honest platform of returning worth for worth. It is in the widest line of reciprocity. * * * It is cheap literature, good literature, and honest dealing nation by nation and man by man." Against the bill, Mr. Coke said, in the Senate[89] that it was urged by a few authors, as against the interest of the reading millions; that it would raise the price of all copyrighted works; and that it was the yielding of our market to the English manufacturers. It was also stated in the House, by Mr. Peters,[90] that there was no demand from the masses of the reading public for any legislation of this character and that the principle involved in such legislation was quasi-special, and therefore objectionable.

The bill was finally enacted into law on the 3d of March, 1891,[91] to take effect July 1, 1895 and, though frequently amended, stands today substantially the same as in its original forms. The act stipulated that its provisions should apply to a citizen or subject of a foreign state or nation, if that foreign state or nation permitted a citizen of the United States the benefit of copyright on a similar basis to that of its own citizen; or if such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyrights, by the terms of which agreement the United States may at its pleasure become a party.

The commissioner of labor made a report to the Senate in 1901,[92]

[86]Cong. Rec. XXII., pt., 3, 2384.
[87]Cong. Rec., XXII., 57.
[88]Op. cit.
[89]Cong. Rec., XXII., pt. 3, 2383.
[90]Cong. Rec.. XXII., pt. 1, 56.
[91]26 Stat., 1106.
[92]56th Cong. V., S. R. No. 87

on the workings of the act of 1891. He found that while some objections were urged to the law, especially by publishers, the concensus of opinion seemed to be that the measure was a distinct success. The criticism has been well made, however, that a foreign author had to bring out his work here at the same time that he published it at home. As it was often impossible for him to tell in advance whether his work would sell here in sufficient quantity to justify an American edition, but few foreign authors, except the English, have derived any benefit from the copyright law. There has been some agitation, consequently, in favor of its repeal or amendment. The difficulty could be obviated, however, by granting a reasonable time, during which the foreign author might bring out his American edition, after the first publication of his work at home.

In concluding this chapter, then, we see that our policy with regard to shipping has followed closely British precedents. Our laws confine American registry to ships built, owned, and officered by American citizens. Our coast-wise trade is reserved exclusively to our own vessels. Tonnage taxes have been discriminatory but provision has been made for their abolition upon terms of reciprocity.

The legislation regarding patents, following British precedents, made no discrimination against aliens at first. Then followed a period in which the privileges of our patent laws were confined to citizens, or to those who had declared their intentions to become citizens, and in which aliens were discriminated against in the matter of fees. Such legislation was finally swept away and the alien put, in regard to patent rights, upon the same footing as citizens.

As to trademarks, alien friends have always been entitled to the protection of their property in these, as they exist in the states at common law, and therefore irrespective of any legislation. Federal legislation, in regard to trademarks, dates from 1870, and secures the citizen or resident alien, engaged in interstate or foreign commerce, a protection for his property in trademarks. An international convention was entered into in 1887 for the purpose of regulating the trademark rights of citizens of one country while in another.

There is a common law property also in both published and unpublished works of authorship, and an alien is protected in this as in any other property. Copyright laws were enacted to secure a monopoly of such property and to confine their benefits to citizens and permanent inhabitants of this country. In 1891 an international copyright act was passed, extending the benefits of our copyright laws to aliens upon terms of reciprocity.

III. Federal Legislation: Public Lands; Real Estate in the Territories

The most important federal legislation affecting resident aliens has been that concerning the right to acquire public lands and to hold real estate in the territories.

Public Lands.—The constitution gives Congress plenary power to make rules and regulations for the disposal of the public land of the United States. The federal government not only has the right of eminent domain, as to such land, but the fee and the prime disposal of the soil.

In the beginning of our national existence we had a sparse population and a vast expanse of public lands. The government looked most kindly to the coming of foreigners, the settlement of the frontier, and the rapid increase in population.[1] Under the circumstances it is not surprising that the public lands were disposed of to settlers upon terms of unheard of liberality, and that in this policy no discrimination was made against those who desired to build their homes and live here, and yet who had not ceased to be subjects of foreign sovereigns.

The Right to Purchase.—In the acts offering the public lands for sale no requirement has been made of citizenship, or even of declaration of intentions. Such lands have been offered on the same terms to all irrespective of their allegiance, It was stated in the House, on January 20, 1790,[2] that a certain applicant for the purchase of public lands was an alien and, therefore, might not, as the laws were generally understood, hold real estate, except as a trustee. Reply was made to this that according to the common law which had been adopted in the several states an alien might not, it was true, hold real estate, but, "be it remembered that we have not adopted the common law, and therefore are free from its restraints." It seems to have been generally thought desirable, at this time, to

This is the third of four papers. The first and second may be found in Vol. III., pp. 493 and 565.

[1]Referring to the provision of the Ordinance of 1787 regulating property Joseph S. Wilson, a commissioner of the general land office, said: "This statute struck the keynote of our liberal system of land law, not only in the states formed out of the public domain but also in the older states."

[2]Ann. of Cong. I, 1068.

admit foreigners to the public lands upon the same terms as citizens in order to induce immigration.[3]

That the liberal land policy was appreciated and taken advantage of by immigrants, as its advocates had predicted would be true, may be seen from the following statement which appeared in the "Emigrant's Directory"[4] published in Liverpool in 1820 * * * "the mode adopted by Congress for their disposal (that of the public land) is a matter of great public interest, not only to the present citizens of the United States, but to the world at large; for all the inhabitants of the earth may avail themselves of whatever advantages may result from it. By the benevolent policy of the general government, the right hand of fellowship is held out to all mankind. Whoever arrives in the country for permanent settlement can become a citizen within five years after his arrival and be entitled to partake in all the blessings that this chosen country and its excellent institutions can afford."[5]

PRE-EMPTION.—The policy of disposing of the public lands by sale was that first instituted by the government, but this policy came in time to be supplanted and overshadowed first by the pre-emption and then by the homestead systems under which the public land might be secured upon more favorable conditions.

The first general pre-emption law was passed by Congress on the 29th of May, 1830.[6] Under this and the pre-emption law of 1836, citizenship or a declaration of citizenship was not required, but they afterwards came to be required in the first general and permanent pre-emption act, that of September 4, 1841.[7] The words "Every settler or occupant of the public lands," in a pre-emption statute, were held to be sufficiently broad to embrace aliens as well as citizens. In administering such a statute the land department made no discrimination, and even extended the right to free negroes when the laws of the state in which they claimed pre-emption allowed them to buy lands.[8]

[3]In an article on "Alienage" in the Law Mag. II., 39, 1843, it is stated that the permission to hold land untrammelled by restraints was the policy pursued by our government because no foreigner would presumably purchase real estate without intending to cultivate and improve it.

[4]P.p 99-100.

[5]In *Courtney v. Turner*, 12 Nev., 345, the court declared what was the settled practice when it said: "An alien will be protected in the possession of the public land the same as a citizen. Neither can hold as against the government title."

[6]4 Stat., 420.

[7]5 Stat., 453. See statement by Mr. Anderson, in the Senate. Cong. Globe, 26th Congress, 45 App.

[8]*Wynn v. Morris*, 16 Ark., 414. Appeal dismissed 20 How., 3.

Attorney-General Butler gave an opinion[9] on April 18, 1836, as to the rights of aliens under the pre-emption acts of 1830 and 1834, in the following words: "In reply to your inquiry I have the honor to state that I find nothing in either of these acts to limit their operation to citizens of the United States. The words "Every settler or occupant of the public lands" are sufficiently broad and comprehensive to include aliens; and as it must have been known to Congress that the public lands were, in many cases, in the possession of persons not actually citizens of the United States, it is not to be believed that they would have used these general terms had they designed to confine the benefit of these laws to citizens merely. Aliens, if actual settlers, were within the policy of these laws; and though as a general rule, they cannot hold land against the state, yet, according to the land laws of most (if not all) of the American states, they may take lands by grant and may hold the same till divested by forfeiture, on office found, or by death and escheat. The words of the law being sufficiently general to embrace all persons capable of taking and holding lands under letters patent from the United States, as against them, and aliens having this capacity, I am of the opinion that your question must be answered in the affirmative."

During the debate on the pre-emption act of the year 1838, Mr. Merrick, in the Senate, moved the amendment "that the benefits of pre-emption be confined to citizens of the United States, excluding unnaturalized foreigners or those who had declared their intention to become citizens."[10] In defending his motion Mr. Merrick said: "The amendment I have offered proposes so to modify the bill as to limit the grant of this bounty to our own *citizens;* to exclude from the immense advantages of this law and this policy (for remember, it is avowed on the other side that this is to be the settled policy of the government, and all other similar laws are to be passed continuously hereafter), all aliens who are neither native nor naturalized citizens of the Union. Between the native and naturalized citizen, I propose to make no distinction in this respect; but I desire, while you are about to deal out the property of the American citizens in bounties and gratuities, that you should confine your liberality in disposing of your means to your own people."

Mr. Walker opposed the amendment not only because it would exclude aliens who had been driven by oppression to seek a shelter in this land, but also because it would exclude that desirable class of immigrants who leave their old homes voluntarily and seek new

[9]3 Op. A.G., 91.
[10]Cong. Globe, XXV., 129 App.

homes in the land of their adoption. The amendment was opposed by others on the ground that it would reverse the long standing policy of our government, and by Mr. Novell[11] because, he said, Congress had no constitutional authority to prescribe the class of persons who might become the proprietors of lands in the United States. "It was for the states themselves to regulate this matter." Mr. Benton opposed the amendment because it sought to make a distinction between aliens and citizens in the acquisition of property. He controverted the contention of Mr. Merrick that pre-emption was a bounty. "In point of money the pre-emptor pays about as much as any other purchaser. It is a sale at full price." He also declared the fact that an alien was a settler was the best declaration of his intention to become a citizen.[12] Mr. Merrick's amendment was lost by a vote of twenty-eight to fifteen.

Attorney-General Cushing, making reply on July 28, 1855,[13] to a question as to whether aliens could enter lands under the act of Aug. 4, 1854, said: "Now, the general law, so far as regards the United States, undoubtedly enabled aliens to purchase the public lands, subject only as to their tenure to such limitations as the particular states may enact.

"Originally, an alien, there is no doubt, was also entitled to enter land by pre-emption, (See Mr. Butler's opinion of April 18, 1836,) but the law now in force gives the right of pre-emption only to a person being a citizen of the United States, or having filed his declaration to become a citizen as required by the naturalization laws.

"Aliens, who have not filed a declaration of intention to become citizens, are now excluded generally from pre-emption and, of course from pre-emption under the graduation act.

"But what is there in the act to forbid the alien to purchase the graduated lands for cash, without pre-emption, and in open competition with all the world, as he may other public lands? I do not perceive anything."[14]

[11] *Ibid*, p. 130.

[12] That pre-emption was a bouuty—a bounty which extended to all settlers and occupants of the public domain—was declared by the court in *Wilcox v. Jackson*, (13 Pet., 498); that it was not a free grant, see "The Land Question in the United States," p. 163, by Dr. Sato.

Mr. Webster also opposed the amendment (*ibid*, p. 133) "because such a limitation has been altogether unknown in our general system of land sales, and to introduce it here, where we are acting on rights already acquired, would be both invidious and unjust."

[13] 7 Op. A.-G., 351.

[14] The graduation act of Aug. 4, 1854, was an enlargement of the principles of the preemption act by lowering the price to actual settlers and cultivators of lands that had been in the market for ten years or more.

This quotation from the opinion of Attorney-General Cushing shows that the California court, in *People v. Folsom*,[15] had in mind the earlier pre-emption laws and not the later, when it said: * * * "and to this extent a system of pre-emption has been adopted in all the territories and new states in which there is no discrimination between foreigners and native citizens. Foreigners can hold property in all the territories, and may inherit in the absence of legislation on the subject."[16]

HOMESTEADS.—The question of granting the public lands to actual settlers as homesteads, that is without the payment required under the pre-emption laws, had been frequently proposed in the thirties and forties and became a political question in 1852. The Free-soil Democratic party declared in their convention of that year: "That the public land of the United States belongs to the people and should not be sold to individuals nor granted to corporations, but should be held as a sacred trust for the benefit of the people and should be granted in limited quantities, free of cost, to landless settlers." The Democratic party of the same year had the following resolutions in their platform: "Resolved, That the liberal principles embodied by Jefferson in the Declaration of Independence and sanctioned in the constitution, which make ours a land of liberty and the asylum of the oppressed of every nation, have ever been cardinal principles in the Democratic faith; and every attempt to abridge the privilege of becoming citizens and the owners of the soil among us ought to be resisted with the same spirit that swept the Alien and Sedition laws from our statute books."

The homestead idea did not prevail, however, at this time. In opposition to the proposed measure, Mr. Sutherland declared in the House on the 22d of April, 1852,[17] that if the measure sought the public welfare, it ought to grant the lands to foreigners on the same terms as to citizens, and thus encourage foreigners to come and add to the common wealth of the nation by their labor. Two years later Mr. Weller said in the Senate:[18] "There is not a single senator on this floor who believes, or will undertake to say, that it is dangerous to public liberty to allow foreigners to buy your public land at $1.25 per acre; but the very moment you propose to give them land; the very moment you propose to place them upon an equality with your own countrymen and enable them, at the expiration of

[15]5 Cal. 373, 1855.
[16]See also *Geofray v. Riggs*,133 U. S., 272.
[17]Cong Globe, XXV., 730
[18]Cong. Globe, XXIX., 1092.

five years, to acquire a title from the government, that very moment it is affirmed they become dangerous.''

It was not proposed in this measure to give the land to aliens but to allow them to enter upon it and to acquire title after they had been naturalized. In the conference bill which finally passed Congress on June 19, 1860, it was provided that any person, not a citizen of the United States but, who, at the time of filing his application, had filed a declaration of intention and who should have become a citizen before the issuing of the patent, should be entitled to the benefits of the homestead act.

President Buchanan returned the bill to the Senate on June 23, with his veto, stating that it confined its privileges to citizens of the United States who are heads of families but extended these privileges to every person of foreign birth residing in the country who had declared his intention to become a citizen, though he may not have been the head of a family. His reasons for vetoing the measure were as follows: ''We ought ever to maintain the most perfect equality between native and naturalized citizens. They are equal and ought always to remain equal before the law. Our laws welcome foreigners to our shores, and their rights will ever be respected. While these are the sentiments on which I have acted through life, it is not, in my opinion, expedient to proclaim to all the nations of the earth that whoever shall arrive in this country from a foreign shore and declare his intention to become a citizen, shall receive a farm. * * * The bill makes a distinction in favor of such persons over native and naturalized citizens. When applied to such citizens, it is confined to such as are heads of families; but when applicable to persons of foreign birth recently arrived on our shores, there is no such restriction. Such persons need not be at the heads of families provided they have filed a declaration of intention to become citizens. Perhaps this distinction was an inadvertence; but it is, nevertheless, a part of the bill.''

In the bill which finally became law, receiving the president's approval May 20, 1862,[19] the wording is changed so that any person who is the head of a family, or who has arrived at the age of twenty-one years and is a citizen of the United States, or who shall have declared his intention to become such, is entitled to the benefits of the act. Full citizenship is required in such cases before the final title can be obtained. In Re Krogstadt[20] the Secretary of the Interior ruled that an alien having made homestead entry and having sub-

[19]12 Stat., 392; R. S. 2289.
[20]4 Land Dec., 564.

sequently filed his intention to become a citizen will not have the right to purchase defeated on account of the alienage at the time of the entry, in the absence of an adverse claim. That is, naturalization has a retroactive effect so as to be deemed a waiver of all liability to forfeiture and a confirmation of title. Again, it was held in *Bogan v. Edinburgh Am. Land Co.*,[21] that "In the absence of any adverse claim, the sale of land under section 2301 of the R. S. to one who has declared his intention to become a citizen is a waiver of any objection on the part of the United States that the purchaser was an alien when he made his application under section 2289, and the Commissioner of the General Land Office cannot subsequently retract that waiver and forfeit the right to the land on account of that objection."

MINERAL LANDS.—By the act of July 26, 1866,[22] it is declared "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens." In the act of May 10, 1872,[23] the wording is slightly changed so as to read the lands are open to "occupation and purchase" by citizens and those who have declared their intention. The House bill had provided that "any person" might take up a mining claim, but in the Senate this was changed to read, as finally embodied in the act, "any citizen of the United States or person who has declared his intention to become such." The act also provides that "nothing herein contained shall be construed to prevent alienation of the title conveyed by a patent for a mining claim to any person whatever." This provision enables aliens to acquire the highest title by purchase, and to be protected in the enjoyment of such property by the guarantees of the Fourteenth Amendment.

By this act of 1872, the location by an alien and all the rights following from such location are voidable, not void, and are free from attack by any one except the government. In the case of *Manuel v. Wulff*[24] the court said * * * "as Alfred Manuel was a citizen, if his location was valid, his claim passed to his grantee, (an alien) not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the gov-

[21]63 Fed. Rep., 192.
[22]14 Stat., 86.
[23]17 Stat., 91; R. S., 2319.
[24]152 U. S., 505.

ernment only.'' That an alien's right to mineral claims is good against all the world except the sovereign power is also stated in *McKinney Creek Min. Co. v. Alaska etc., Co.*,[25] and *Billings v. Aspen Min. Co.*[26] In the *Manuel v. Wulff* case (*supra*) the court further held that a deed of a mining claim by a qualified locator to an alien operates as a transfer of the claim to the grantee, subject to question in regard to the citizenship by the government only; and that if one party, who is an alien at the outset, becomes a citizen during the proceeding and before judgment, his disability under section 2319 R. S. to take title is thereby removed.

An interesting attempt was made by a territorial legislature to preclude aliens from holding mineral lands. The Organic Act of the Montana Territory of May 26, 1864,[27] provided that the territorial legislature should pass no law interfering with the primary disposal of the soil. After this followed the congressional legislation in regard to mineral lands, contained in the act of May 10, 1872, indicated above. In spite of this action on the part of Congress, the territorial legislature passed an act ''to provide for the forfeiture to the Territory of placer mines held by aliens.''[28] The validity of this territorial statute was tested in the case of *Territory v. Lee*[29] The defendant in the case, an alien and subject of the Chinese empire, had purchased a placer mine from a citizen. Thus, the case involved both the organic act and the act of 1872, as well as the territorial statute.

The court held, on the general principles of the common law, that alienage is a disability which can be taken advantage of only by the sovereign power; the real property purchased by an alien does not vest in the government until office found. Until then, the alien is seized and may defend his property as a citizen; and ''as to sales and transfers of real estate by or to aliens, they stand upon the same footing as sales or transfers made by citizens, subject only to the right of the sovereign power of the government to institute proceedings to cause a forfeiture.'' The court further held that the territory of Montana did not possess the inherent sovereign power necessary to enable it to cause the forfeiture to itself of the property of aliens, situated within its territorial limits, for the title to this property still remained in the United States, subject only to a pos-

[25]183 U. S., 563.
[26]52 Fed. Rep., 251.
[27]13 Stat , 85.
[28]Cod. Stats., 593.
[29]2 Mont., 124, 1874.

sessory easement acquired by the alien through purchase.[30] Congress did not prohibit citizens, who rightfully acquired possessory title, from selling and transferring the same to aliens; but if an alien took title to such lands, the government could cause them to be forfeited. The act of 1872 excluded only aliens who had not declared their intention to become citizens from entering upon such lands. It followed that the attempt on the part of the territorial legislature to forfeit the lands acquired by aliens under the provisions of the act of Congress was null and void.[31]

REAL ESTATE IN THE TERRITORIES.—So far, the relation of aliens to public lands has been considered irrespective of whether those lands lay in states, in territories, or in the unorganized domain. It is now proposed to consider the real estate within the territories only. Congress has always retained the primary disposal of the soil in newly created states, and it has plenary power over all such matters in the territories.[32] In the absence of prohibitory legislation on the subject, there has been nothing to prevent foreigners from acquiring and inheriting real property in the territories, because the United States has no common law of its own, and the territories, as to such property, are not sovereign.[33]

There have been several strong anti-alien movements in our country. The first of these was that which culminated in the passage of the Alien and Sedition Laws at the close of the eighteenth century.[34] The second of these movements came in the forties and early fifties. By this time the immigration from the Old World had become large and was from a somewhat less desirable class than previously. Already the feeling was growing that the public lands and public offices should be held for native born Americans. By 1852 the Know-Nothing party had come into prominence, and in 1856 it ap-

[30]Knowles, J., dissented from this proposition and stated that such forfeiture had been exacted by territories as well as states

[31]The right of an alien to inherit a mining claim located upon government land is, as against every one but the United States, determined by the laws of the state in which the mine is located. *Lohman v. Helmer*, 104 Fed. Rep., 178.

An alien who is honorably discharged from the army or navy occupies the status of one who has declared his intention to become a citizen, under section 2166 R. S. *Stickley v. Hill*, 122 Utah, 257.

[32]*National Bank v. County of Yankton*, 101 U. S., 129.

[33]In addition to the citations already made see *Wheaton v. Peters*, 8 Pet., 657; *Dawson v. Shaver*, 1 Black., 205. It is a general principle that if a state grants an alien a warranty title he is enabled to transmit the property by descent even to non-resident alien heirs (*Etheridge v. Malempre*, 18 Ala., 565; *Goodell v. Jackson*, 20 Johns., 693); but if the patent issues from a ministerial officer, upon ordinary purchase, it is subject to escheat, as in the case of purchase from a citizen. (*Government v. Robertson*, 11 Wheat, 332)

[34]See page 181.

peared as a regular national political organization. Millard Filmore was nominated for the presidency on a platform which called for a change in the naturalization laws, such as would require a continuous residence of twenty-one years, for the reservation of all government employment to native born citizens and for exclusion from participation in the suffrage within any state or territory of those who had not become fully naturalized under the laws and constitution of the United States. In the election which followed, Filmore received 874,504 popular votes out of 4,053,967. Even this large vote probably failed to show the full force of the nativistic movement which, however, soon afterwards went to pieces under pressure of the burning questions leading up to the war.[35] The third of these widespread anti-alien movements was that of the eighties, centering around the question of holding real estate. It is desired here to trace this latter movement which culminated in an act of Congress in 1887 prohibiting aliens from holding real estate in the territories.[36]

After the Civil War there set in, particularly with the beginning of the era of transcontinental railroad building, an enormous influx of immigrants, both from Europe and from China. At first these newcomers were received with open arms, but by the later seventies a decided reaction in sentiment towards them had set in. This was manifested in hostile legislation on the part of the coast states and their municipal governments, and in mob violence directed on several occasions against the Chinese, while in the eastern states it became customary to ascribe the prevailing political corruption and municipal failure to the mercenary alien vote. During this period wealthy Europeans were buying up large quantities of land in the western states and territories for ranching, farming, and mining purposes. This excited in the minds of many people grave apprehensions, and as the better grade of public lands was giving out rapidly, American citizens saw with envy lands that formerly would have been open to them for settlement either lawfully or unlawfully in the hands of foreigners. So there set in a widespread movement to exclude aliens from the holding of real estate in both the states and territories.

This anti-alien movement was partly economic and partly political in its character. After it had spent itself, it became popular, in certain political quarters, to ascribe it to the Populists as if they

[35]See the Forum, XIV., 608, Jan., 1893.

[36]It does not fall within the scope of this work to treat of this movement as it arose in the states and territories; only the federal legislation on the subject is dealt with.

alone had been responsible for it. While its strength was undoubtedly greatest in the Populists' strongholds and while that party endorsed the movement against alien landlordism in many of the state and territorial conventions, it was not confined to the Populists' party by any means. Thus, in the Democratic convention of 1884[37] we find the following reference to the movement: "It (the Republican Party) professes a policy of reserving the public lands for small holdings by actual settlers; it has given away the people's heritage till now a few railroads and non-resident aliens, individual and corporate, possess a larger area than that of all our farms between the two seas." The declaration of the Democratic Convention of that year read * * * "and that no more grants of land shall be made to corporations or be allowed to fall into the ownership of alien absentees." The Republican Convention of the same year declared[38] that the party was opposed to "the acquisition of large tracts of these lands by corporations, or individuals, especially where such holdings are in the hands of non-residents or aliens, and we will endeavor to obtain such legislation as will tend to correct this evil."

References were also made in the platforms of both of the leading parties in 1888, and the platform of the "American Convention" of that year contained the following plank: "Resolved, That the soil of America should belong to Americans; that no alien non-resident should be permitted to own real estate in the United States; and that the realty possession of the resident alien should be limited in value and area." The Greenback platform of the same year, also contained the demand "that the alien ownership of lands, individual or corporate, shall be prohibited."[39]

As an illustration of how this movement manifested itself in state legislation passing reference will be made to what was often spoken of as "Scullyism" in Illinois, although this legislation followed, in point of time, that of Congress. Scully, a British subject, came to this country in the sixties and purchased large tracts of land in Illinois and surrounding states, obtaining most of it at $1.25 an acre. His total possessions were said to amount to over 200,000 acres. He managed his lands somewhat on the feudal plan, charging all he could get as rental and requiring the tenants to make whatever improvements they desired at their own expense. Because of his large holdings, his introduction of the feudal spirit in his dealings with his tenants, his foreign citizenship and prolonged residence

[37]Hopkins "Political Parties in the United States," 362.
[38]*Ibid*l 375.
[39]*Ibid,* 377.

abroad, Scully came to be known popularly as "Lord Scully."[40]

When the movement against alien landlordism first struck the Illinois legislature, Scully is said to have laughed at it and to have declared that if any hostile measures should pass they would be promptly thrown out by the courts. Afterwards a vigorous fight was put up to defeat the measure introduced, but the bill passed and became law in June, 1887. It prohibited aliens from acquiring real estate in Illinois by "descent, device, purchase, or otherwise," but granted resident aliens who had declared their intention to become citizens six years within which to dispose of such property. Scully, after the passage of this act, rather than sell his possessions, became a naturalized citizen.[41]

It is proposed now to take somewhat in detail the congressional legislation bearing upon the aliens' right to hold real estate in the territories and in the District of Columbia. While the measure to prohibit alien ownership of real estate in the territories did not become law until 1887, various bills looking to that end were introduced in Congress early in the eighties. Thus, on December 11, 1883, Mr. McAdoo introduced a bill in the House to prevent aliens, other than bona fide settlers, from owning land in the territories of the United States. The matter came up again on March 11, 1884. Mr. Holman, on that occasion, had this to say:[42] "Time will develop the great landed estates which your land grant system has rendered possible, even if that was not its original purpose, and will call down upon it the execration of mankind." He then submitted a list of foreign land holdings taken from the San Francisco Daily Examiner, showing that over 20,000,000 acres were so held by foreigners, practically all of it within the land grant region.

Mr. Van Wyck took up the matter in the Senate on May 2, 1884,[43] and quoted a letter from a New York-Edinburgh firm which stated that it had placed more than $25,000,000 of Scotch capital alone in western cattle ranches; that some of their companies owned twenty times as much as thirty square miles of such land; and expressing fear and opposition to Senator Edmund's bill limiting foreign holdings to thirty square miles. A few days later Mr. Plumb stated in the Senate in reference to the conference bill,[44] that it was not by any means a perfect measure, it was not of as wide scope as

[40]See the N. Y. Times, Aug. 26, 1906.

[41]See the Chicago Daily Tribune, May 21 to June 16, 1887; 49th Cong., 1st sess. H. R. Vol. VII., No 1951; the North American Rev., Jan. and April, 1886.

[42]Cong. Rec., XV., pt. 6, 16 App.

[43]*Ibid*, 3690.

[44]Cong. Rec., XV., pt. 6, 4017.

he should prefer to have it, but that it was a beginning in the right direction. "It is an affirmation of the principle that the burdens of American citizenship shall go along with its benefits, and that whoever desires the protection of the American flag, of American institutions, and American law in regard to his property shall assume the burden of American citizenship as well." On June 19, of the same year, Mr Hopkins had this to say in the House:[45] "While the Democrats are laboring to wrest from the corporations unduly favored by the Republicans, the vast areas of lands illegally held, because unearned, distinguished Republicans have stood in the breach opposing the effort. And yet, the national convention of that party hypocritically declares in favor of the forfeitures of the very grants which in their profligacy, they made." Mr. Parker declared in the House about the same time:[46] "Our country is becoming the pasture land, the cattle field, and sheep-walk, of foreign land owners; we are furnishing outlying lands for foreigners of wealth whose interests are antagonistic to our own. This is monopoly in its most hurtful form and outside influence in its impertinent assumption. No true American can consider it without a feeling of aggravation and hostility."

Mr. Oates, for the Committee on Public Lands, reported to the House on January 20, 1885, as follows:[47] "This alien non-resident ownership will, in the course of time, lead to a system of landlordism incompatible with the best interests and free institutions of the United States." Referring to the bill which his committee recommended, Mr. Oates said: "Perhaps objection may be made to the bill on the ground that its tendency will be to drive foreign corporations from this country. If it were, we are not quite sure that any permanent harm would result therefrom to anyone on this continent. The mortgages and land bonds held by aliens would not be materially impaired by the law proposed. They are deeds of trust and can be foreclosed and the land sold in default of payment by an alien holder as well as by a citizen. Neither can, according to law, buy at his own sale, because of the conflict of interest with duties, unless it is so stipulated in the contract; and this being known, can have no other effect upon future foreign investors in this class of securities than to make them a little more careful and not to rely upon the prospect of ultimate ownership of the land mortgaged."[48]

[45]Cong. Rec XV., pt. 6, 307 App.
[46]*Ibid*, 375.
[47]48th Cong., 2 ses., H. R. I., No. 2308.
[48]As to the number of foreigners who settled upon the public lands, Mr. Hopkins stated in the House (Cng. Rec. XVI., pt. 3, 152 App.) that fully one-

As the territories were immediately affected by this proposed legislation, it is of interest to know what attitude their delegates in Congress took in regard to these measures proposing to limit alien land holdings. Mr. Carey, from Wyoming, remarked in the House, June 28, 1886,[49] "I need but say that the native born population (in the territories) bears the ratio of at least seven to one to those of foreign birth, and that the number of the latter class who do not hasten to become good and patriotic citizens of the republic is too trifling to take into account." While favoring the proposed legislation, he nevertheless wished no aspersions cast upon the inhabitants of the territories, either native born or foreign. A few days later, Mr. Toole of Montana said, in the House,[50] that he objected to the pending measure because it included mineral lands as well as agricultural. This was not wise, he thought, because mineral lands had to look to European capital for their development. The delegates generally, however, reflected the wishes of their constituents in the matter that aliens should be excluded from holding land.

Mr. Plumb, speaking in the Senate of the policy embodied in the measure, declared[51] that policy to be to exclude persons not citizens of the United States, or who had not declared their intention to become such, from holding real estate within the jurisdiction of the United States, because such persons "owe no permanent obligation to our government and therefore ought not to receive the privileges which governments have generally reserved to their own citizens. The House Committee reported out the bill on July 31, 1886[52] saying that the rapid absorption of the public domain by non-resident aliens furnished occasion for much anxiety to the people; that the public lands were fast being exhausted, the larger part of what remained being either arid or difficult of access. What did remain, the committee thought, should be preserved from the encroachment of aliens whose birth and education created in them sentiments inimical to the country. The measure proposed by this House Committee was drastic. It did not recognize any treaty obligations, in the matter, nor the right of any one to hold property which might come to him by devise or inheritance. Mr. Call, in the

third of all the foreigners who arrive in the country did so. See further the report of the Committee on Public Lands, 49th Cong., 1st ses., H. R., VII., No. 1951.

[49]Cong. Rec. XVII., pt. 8, 240 App.

[50]*Ibid.*, 321.

[51]Cong. Rec. XVII., pt. 8, 7955

[52]49 Cong., 1st ses., H. R Vol. II., No. 3455.

Senate on August 4, 1886,[53] called attention to the fact that the question as to what extent aliens should be allowed to own real estate in the territories, and of establishing, so far as Congress can, a policy for the states, was one of grave importance in connection with the amount of capital and property invested by American citizens in real estate in foreign countries, as well as by the citizens and subjects of foreign countries residing here. He asserted that the table purporting to show the amount of land held by foreigners in the territory was incorrect and that the amount of such holdings had been greatly exaggerated. While the bill applied to a limited area only of the United States, its passage was expected to be followed by similar measures in the several states acting within their own jurisdiction.[53a]

The act which finally became law on March 3, 1887,[54] provided "That it shall be unlawful for any person or persons not citizens of the United States or who have not lawfully declared their intention to become citzens, or for any corporation not created by or under the laws of the United States or of some state or territory to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein in any of the territories of the United States or in the District of Columbia, except such as may he acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created;" provided, however, that nothing in the act should impair the obligation of treaty rights. Corporations, more than twenty per cent of whose stock was held by aliens, were prohibited from acquiring or holding real estate in the territories or the District of Columbia. No corporation, except such as was organized to construct or operate railroads, canals, or turnpikes, should be allowed to own more than 5000 acres in any territory. The prohibitions in the act were not to affect existing titles. It was made the duty of the attorney-general to enforce the forfeiture, of such lands as were held contrary to the provisions of the act.[55]

The Daily Financial News of London, in its issue of May 18, 1887, in commenting on this act of Congress and its bearing upon British investors, had the following to say: "In view of the large amount of British capital which has been and is being put into

[53]Cong. Rec. XVII., pt. 8, 7954.

[53a]These expectations were, for the most part, doomed not to be realized. The legislation in Illinois was an exception.

[54]24 Stat., 476.

[55]In the case of *Johnson v. Elkins* (1 App. D. C., 430), the court held that this act providing that property held contrary to its provisions should be forfeited to the U. S., was subject to attack only by the United States. The case also held that the act applied only to titles acquired after its passage

United States mines, every question affecting its safety is of vital importance to the British public. * * * Till recently it (the control of Congress) was much more loosely exercised than in the states, and grave abuses arose both in land and in mining speculations. These were not confined to American citizens, but speculating English and Scotchmen played a prominent part in them. By various devices they acquired vast tracts of country which they withheld from settlement in order to force up its value and make a big profit on it at the expense of bona fide settlers. In most cases it was American citizens who beguiled them into such adventures but this did not render them any more popular with American citizens who had no share in the plot.

"It has been evident for some time that the bona fide settler was working up for an outbreak against dummies generally, and foreign dummies in particular. * * * Until this serious point (as to whether mining property was included in the prohibited real estate) is cleared up, mining speculators should give a wide berth to the territories of the United States. It is not safe for them to spend their own money there and it will be wrong in them to ask money from the public for such a purpose."

Mr. R. C. Alden[56] writing to the Chicago Tribune, on June 4, 1887, concerning the discrimination which the recently enacted law made against the young and struggling territories and in favor of the states, had this to say: "The primary intent and motive of our congressional legislation which culminated in Representative Payson's bill, passed March 3d last, was sound and wholesome, namely to prevent any Scully landlordism in our territories; also to wrest present illegal holdings of vast tracts of land and prevent future holdings thereof by so called "cattle barons." * * * This alien law is in its present form a two-edged sword that cuts against us as well as against a phantom enemy. Phantom, indeed, for how can alien and foreign capital injure us by investment in our territories under broad, comprehensive, and judicial laws? * * * Particularly our necessitous and borrowing pioneers in the territories can advantageously divide honors between the comparatively high rates of interest demanded by American lenders and low rates which satisfy European lenders."

The act had been so carelessly drawn that it prohibited the acquisition of land upon which legations or other residences might be built by the representatives of foreign governments in the District

[56]This gentleman seems to have been an American promoter of mining property who worked chiefly with European investors.

of Columbia. An amendment was passed on March 9, 1888[57] removing such restrictions.

Shortly after the passage of the act of 1887, an effort was made to extend its operations so as to prohibit aliens from acquiring title to or owning a greater interest than a leasehold for five years in any lands anywhere within the United States,[58] that is, the measure proposed to extend the act of 1887 without its exceptions as to inheritance, ordinary cases of collection of debts in good faith, and cases covered by treaties, to land wherever found, even within the limits of the several states. The majority of the committee on the Revision of the Laws thought that Congress had the constitutional power to do this.[59] Likewise, the House Committee on the Judiciary reported on the 9th of June, 1890,[60] that the United States has the constitutional power to prohibit alien ownership of land anywhere within the limits of the United States; it has the sovereign right to exclude aliens from coming within its jurisdiction and this right "includes the less one of defining what property rights they may exercise after they are admitted, and during the continuance of their alien condit on. * * * We see no reason why the law should be thus restricted. It ought to be general in its provisions. If Congress has not the power to extend the law to the states, then we have the anomaly of persons who owe no allegiance to the United States buying up and owning all the lands within a state. The argument which leads to such a conclusion is unsound."[61]

The question as to whether the act of 1887 included mines in its designation of real estate does not seem to have been much considered at the time of the passage of the act. That it did so include mining property was held by the attorney-general in an opinion delivered shortly after the passage of the act.[62] That most of the members of the House either did not know that the act of 1887

[57]25 Stat, 5.

[58]50th Cong., 1st ses., H R., 4916.

[59]50th Cong., 1st ses., H. R., Vol, V., No. 1 81.

[60]51st Cong., 1st ses., H. R., Vol. VII., No. 2388.

[61]That Congress has the power to prohibit alien land-holding within the states is very doubtful, to say the least. Such property rights have always fallen within the jurisdiction of the states, and if Congress has such power it is difficult to see why it might not exercise complete control over all the personal and property rights which aliens now enjoy pursuant to state laws. By analogy, the reasoning in the Civil Rights Cases would deny such power to Congress. If the foreign relations clause is not applicable because the holding of real estate in our system is a domestic concern for which the federal government is not answerable in any way under the law of nations, nor which is provocation of inporeational comity, it would seem to follow that Congress does not possess the wtner.

[62]19 Op. A.-G., 26.

would include mining property, or that they did not fully anticipate the effects of the act, was made evident by the proposals which were immediately introduced to amend the act so as to exclude such property from its provisions. During the first session of the succeeding Congress no fewer than seventeen bills were introduced in the two houses looking to the amendment, repeal, or modification of the law. On February 8, 1888, Senator Stewart received the unanimous consent of the Senate to consider a bill authorizing the sale of mineral lands to aliens. He stated that the mineral lands had been well guarded against monopolies by the former laws and that the foreign capital which had been invested in developing such property during the last thirty years had been very beneficial to the country. Foreign capitalists, he said, had probably expended more money here than they had taken away, for mining is a risky business, one, however, employing a great many people and spending a large amount of money.

The Committee on Mines and Mining introduced the following amendment to the laws of 1887:[63] "That this act shall not relate to or in any manner effect the title to mineral lands or mining claims in the territories of the United States which have been acquired or held under the mineral laws of the United States, nor to mills or other reduction works or property used in the production of metals from said mineral lands or claims; but, as to all such mineral lands, mining claims, mills, reduction works, and other property, the laws of the United States and of the territories shall be and remain the same as though this act had not been passed."

Mr. Mitchell stated in the Senate[64] that this proposed amendment had been recommended strongly by the present governors of every one of the territories, with one exception. He tacked on an amendment to the effect that the Chinese should be excluded forever from such ownership, but was induced to withdraw his amendment in the interest of the principal amendment. Mr. McPherson, arguing against the amendment, said that if it should pass, foreign capitalists would come in and purchase large tracts of land possessing vast mineral wealth and holding them away from the occupancy of citizens of the United States who desire to prospect for and discover such mineral wealth. The amendment, he said, would be an abandonment of the principle intended to be embodied in the law of last year and which had been passed in accordance with the prevailing sentiment of the country. Mr. Plumb upheld the original act in

[63]50th Cong., 1st ses., S. R., No. 703.
[64]Cong Rec XIX., pt. 2, 1042.

the following words:[65] "We have sought not only the investment of foreign capital in all our enterprises, but the introduction of foreign labor and foreign population. * * * I think, on the whole, the sentiment of the country is pretty clearly crystallized in the idea that it is about time to call a halt; at all events, to amend to some extent the invitation which we have heretofore made broad enough to cover every person of the human kind. This movement to limit the holdings to real estate in the United States to persons who are citizens is in the direction of that public sentiment." Mr. Reagan, also in opposition to the amendment, after stating that foreigners had within a few years past come to be the owners of large amounts of land and that the public sentiment which had arisen against them was largely on account of such large holdings, then continued:[66] "This sentiment is one that is not at all unnatural. So far as I know, the general policy of the common and civil law in all countries where these systems have prevailed has been against the holding of lands by foreigners. * * * It seems to me that the danger of the investment of foreign capital, of foreign influence, and foreign landlordship, is just as great in mining communities as in the agricultural communities in proportion to their extent."

The agitation for the removal of the restriction, as it applied to mineral lands in the territories, continued unabated. Mr. Carter stated in the House on April 16, 1890[67] that "Throughout the territories of the west, where this law was made applicable, the sentiment in favor of its repeal is universal. Petitions have been sent to Congress and legislators have memorialized this body for years, for the purpose of inducing Congress to raise from the people of those territories this vast incubus that rests upon their growth and prosperity." A little later he declared that the committee report at the time of the passage of the act of 1887, as to the amount of holdings by aliens, did not disclose one acre of land as held by any alien or foreign corporation in any territory, except one such land grant held in New Mexico; that is to say, all the large foreign holdings were in the states.

The Public Lands Committee of the House, in their report to the Fiftieth Congress, said:[68] "Since the passage of the alien act English capital for investment in mines has been driven from our country into Mexico, the British colonies, and South Africa, to the

[65]*Ibid.*, 1079.
[66]*Ibid.*, 1080.
[67]Cong. Rec. XXI., pt. 4, 3438.
[68]50th Cong., 1st ses., H. R., Vol. III., 703.

great detriment of the American manufacturer and laborer.'' The Committee on Mines and Mining caused an investigation to be made in all the territories for the purpose of seeing how the act of 1887 worked. The agent, in his report, said:[69] ''I have found the universal sentiment throughout the territories to be against the present alien land law so far as it applies to mines. Without exception everybody favored its speedy repeal in this respect, which action would be hailed by the people of the territories with delight. * * * The restriction of twenty per cent ownership has induced aliens to sell out their interests to the great detriment of the territories, and with the proceeds thus realized they have invested largely in mines in the states, where no such discrimination is made against aliens. * * * The progress of the territories has been materially checked by the restriction of the use of foreign capital. A large number of enterprises have been abandoned and several mining camps ruined.'' In the Senate Committee's report on mines[70] it was said: ''It is believed that there is no objection on the part of the people of the territories to the investment of foreign capital in the mines. On the contrary they invite it, and the alien land law of 1887, so far as it restricts the ownership of mines by aliens, is regarded by all as a great inconvenience and a hindrance to the development of the territories. While the people of the territories do not object to the law, so far as it prevents aliens from acquiring title to agricultural lands, they desire an exception to be made so far as the mines are concerned. They desire the passage of a law repealing that provision in the alien land law which affects mineral lands.''

Mr. Holman, in the House, made a vigorous fight against the proposed amendment. He said:[71] ''Ever since the law of 1887 was enacted parties representing foreign syndicates have been here working to secure the now proposed modification of that law to enable them to purchase and hold mineral lands.'' If this amendment should pass, he said,''it will only be a question of time when, under the pressure of foreign capitalists the whole of the act of 1887 will give way, and then who shall say to what extent in the coming years non-resident and alien landlordism will curse this country?'' In his prediction that this opening wedge would prove the undoing of the general law on the subject, future events prove that he was quite correct.

A bill amending the act of 1887 was introduced in the House by

[69]*Ibid.*
[70]50th Cong., 2d ses., S. R., Vol. II., No. 2690.
[71]Cong. Rec. Vol. XXI., pt. 4, 3439.

Mr. Scranton, on Dec. 10, 1896, and became the foundation of the measure enacted into law the following year. As that law itself will be discussed in full, it will be unnecessary to take up the provisions of this preliminary bill which failed to pass. This measure is important, however, on account of the debates which took place and which show the reasons, more in detail, for the act of 1897. Mr. Hepburn, discussing this bill in the House on December 10, 1896, had this to say:[72] "The Populists' platform has time and time again declared in opposition to the acquirement of lands in this country by aliens. The territories which, as I understand, are now clamoring for these changes, proposed in this bill, have approved that platform at the last election. * * * And yet this bill, I undertake to say, does wipe out practically the provisions of the law as now existing—prohibiting alien ownership of lands in the territories —for under the forms of foreclosure provided for in the bill, the provisions of the present law are wiped out. And so, under the terms of a seeming loan and a pretended foreclosure, the provisions of the laws as they now exist prohibiting alien ownership are to be absolutely subverted; and yet these gentlemen who have gone about the country from year to year declaiming against alien ownership, insisting that that was one of the greatest evils the country suffers from, are now here acquiescing in undoing all that has been done heretofore."

Mr. Catron, a delegate from the territory of New Mexico, said in reply to these criticisms: "* * * that every party in that territory favors the passage of this bill. And in the platform of everyone of the parties they endorse the absolute repeal of what is known as the anti-alien bill, of which this bill is merely an amendment." "The object of this bill is to enable the people of the territories to get some of the benefits of foreign capital which have been going to the various states that have refused to adopt legislation of this character, or who, after having adopted it, have repealed it. In the territories of New Mexico, Arizona, and Oklahoma, we cannot get the investment of foreign capital today because no foreigner is entitled to hold, possess, or own real property; and this bill enables him to invest his means and to sell the property under a mortgage he may acquire. He may buy if he sees proper, but he cannot hold it for a longer time than ten years, but must make a disposition on it."[73]

[72]Cong. Rec. Vol. XIX., pt. 1, 77.

[73]To much the same effect were statements made by Mr. Bell, of Colorado, and Mr. Murphy, of Arizona. See also 54th Cong., 2d ses., S. R. Vol. III., No. 1478.

As already stated, the main provisions of this bill which came up for discussion in the House on December 10, 1896, and subsequent days passed both houses and became the law of March 2, 1897.[74] This measure was not intended to displace the act of 1887 but to amend it in several important particulars. It provided that the right to hold and dispose of lands in the United States as secured by treaties should be preserved, so long as those treaties continued in force. The second section read: "That this act shall not apply to lands now owned in any of the territories of the United States by aliens, which were acquired on or before March 3, 1887, so long as it is held by the then owners, their heirs or legal representatives, nor to any alien who shall become a bona fide resident of the United States and any alien who shall become a bona fide resident of the United States, or shall have declared his intention to become a citizen of the United States in the manner provided by law, shall have the right to acquire and hold lands in either of the territories of the United States upon the same terms as citizens of the United States.

"Provided, That if any such resident alien shall cease to be a bona fide resident of the United States, then such alien shall have ten years from the time he ceases to be such bona fide resident in which to alienate such lands.

"This act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town, or village, or in any mine or mining claim, in any of the territories of the United States."

The act further provided that aliens should not be prevented from acquiring lands, or interests therein, by inheritance, or in the ordinary course of justice in the collection of debts, nor from acquiring liens on real estate, nor from lending money and securing it upon real estate, nor from enforcing any such lien, nor from acquiring title and holding such real estate, provided that land so acquired should be sold within ten years, or else the same should escheat to the United States. It was made the duty of the attorney-general to institute proceedings to cause land held in contravention of the act to escheat to the United States and be sold on judgment, the proceeds to be held for one year subject to the order of the alien owner of such lands, if not claimed then, they were to go into the treasury of the territory. The defendant to the escheat proceedings might show that he had, at any time before final judgment, conformed to

[74]29 Stat., 618.

the law by becoming a bona fide resident of the United States, or had declared his intention of becoming a citizen.

It is to be noted that this amendment of 1897 was demanded, in part, by the people of the territories who had urged the passage of the original act in 1887. While the act of 1897 contains the same probibitions as is found in that of 1887, and saves, as does the act of 1887, rights guaranteed by treaty, it goes much further and provides that the restrictions should not apply to land owned by aliens in the territories which was acquired on or before March 3, 1887, so long as it is held by such owners, or their legal representatives.[75] This act of 1897 was so liberal in its provisions that it not only allowed aliens who had declared their intention to become citizens of the United States the right to acquire and hold lands in the territories, but also those who should become bona fide residents of the United States, adding that if any of these should cease to be such residents, they should have ten years from that time in which to alienate their lands. Moreover, it provided that the restrictions of the act should not be construed to prevent aliens from acquiring or holding lots of land in the cities, towns, or villages of the territories, or in any mine or mining claim in any territory.

This law not only allows aliens to acquire lands by inheritance and in the ordinary course of justice in the collection of debts, but also by lending money and securing the same upon real estate. In this last mentioned case, it is true such lands are required to be sold within ten years after title is vested in such aliens, or they are to escheat to the United States. The act even allows aliens holding land in contravention of its provisions to convey their title at any time before the institution of escheat proceedings. Perhaps the most important provision, and certainly the one which reflects most credit upon our policy, is that which allows the proceeds of the sale of an alien's lands, condemned by the courts to be sold, to remain subject to the orders of the alien for one year. That is, the treasury of the territory does not obtain the benefit of such confiscation unless the alien or his heirs or legal representatives sleep upon their rights.

It will thus be seen that, while the act of 1897 purports to maintain the principles contained in that of 1887, it is so liberal in its provisions and contains so many exceptions as practically to nullify the principle of the original act. It was distinctly provided, however, that the act of 1887 should remain in force and unchanged so

[75]See *Johnson v. Elkins* (1 App. D. C., 430.

far as the District of Columbia was concerned. This was due to the feeling that as the national capital was located within the District it was undesirable to allow aliens to acquire real estate which might impede in any way the operations of the government, should it desire to extend its holdings within the said District.[76]

Many persons, both in and out of Congress, thought however, that the liberal provisions of the act of 1897 ought with equal force to be extended to the District of Columbia.[77] Frequent bills were introduced after 1897 with this in view. Mr. Jenkins, for example, in introducing a measure on the 15th of January, 1900, stated[78] that the matter had been frequently brought to the attention of the House by the Commissioners of the District of Columbia. They were of the belief that two useful purposes would be served by the passage of this bill, one of which was to bring the present law into accord with the spirit of the age and allow aliens to hold lands in the District of Columbia; the other was to save much valuable time in Congress.'' He then went on to say that almost every week the attention of the Commissioners of the District and consequently of the House was invited to the claims of parties seeking relief from the present law; and the attorney-general informs us, he added, that there has never been a single enforcement of the law of escheat in the District of Columbia, but that Congress has always been willing to afford relief to every alien who has asked for it. The bill asked for, he continued, is practically in accordance with the legislation now in force in over forty of the states.

On June 19, 1902, Mr. Dillingham, of the House, submitted a report[79] from the Commissioners of the District, strongly recommening the act of 1897 be extended to the District.[80] Mr. Babcock stated to the House[81] on the 10th of February 1905 that the original act had been intended to apply to the territories only in order to prevent acquisition of large tracts of land; it had not been intended for the District of Columbia at all. The committee having charge of the affairs of the District had been obliged to report to the House more than forty individual bills relieving aliens in the District from

[76]Mr. Wm Alden Smith declared, in the House (Cong. Rec. XXXIII., pt 1, 830), that the land in the District of Columbia was more ''sacred'' than that in any state or territory; aliens should not be permitted to own it, he declared, for they might hold it against the best interest, not only of the District, but possibly of the government itself.

[77]See 50th Cong., 1st ses., H. R. Vol. I., No. 30.

[78]*Ibid.*, 826.

[79]Cong. Rec. Vol. XXXV., pt. 7, 7057.

[80]See further 57th Cong., 1st ses., S. R., No. 1991.

[81]Cong. Rec. XXXIX., pt. 3, 2371.

the hardships imposed by the act of 1887, for Congress had never been willing to forfeit the lands held in contravention of that act. The proposed amendment, he said, was designed to relieve Congress of the necessity of all these private bills and to place the District of Columbia on the same footing as the territories.[82]

The proposal contained in these recommendations became law on the 23d of February, 1905.[83] It amends the act of March 2, 1897, "so as to extend to aliens the same rights and privileges concerning the acquisition holding, owning, and disposing of real estate in the District of Columbia as by that act are conferred upon them in respect of real estate in the territories of the United States." Thus, at last, the District was placed on the same footing as the territories, and in both the District of Columbia and the territories the old common law rule as to alien ownership of real estate is, to all practical purposes, done away with.

It has already been pointed out that aliens were not prohibited from holding real estate where they had acquired the title before the passage of the act of 1887, and that the provisions of the act of 1887 did apply to mines.[84] Under the provisions of section 2319 R. S., all mining lands in territories belonging to the United States are open for exploration and purchase to citizens of the United States and those who have declared their intention to become citizens; those who have discovered mineral lands and made the location in accordance with the legal requirements, have exclusive right of possession.[85] The right of a locator can be questioned only by the United States and only by inquest of office found, or in a proceeding to which the United States is a party.[86] Before escheat proceedings the alien is permitted to sell lands unlawfully held and to receive the proceeds of such sale.[87]

An alien, however, who has not declared his intention to become a citizen is not qualified to locate a claim and cannot hold such claim against one who is rightfully entitled to locate it.[88] Under section 2322 R. S. locators have full and complete right to convey their interest,[89] and the transfer of a title to an alien can be questioned only by the government. If an alien becomes naturalized before

[82]See 58th Cong., 3d ses., H R. Vol. III., No. 4219.
[83]33 Stat., 733.
[84]19 Op A.-G., 26.
[85]*O'Reilly v. Campbell*, 116 U. S., 418; *Croesus Min. Co. v. Col Land Co.*, 19 Fed. Rep., 78; *Tibbitts v. Ah Tong*, 4 Mont., 536.
[86]*Billings v. Aspen Min. Co*, 10 U. S. App., 1.
[87]*Tornanses v. Melsing*, 109 Fed. Rep., 710.
[88]*Golden Fleece Co. v. Cable Co.*, 12 Nev., 312.
[89]*Ferguson v. Neville*, 61 Cal., 356.

judgment in a suit brought to test the title, his disability is thereby removed.[90] The occupation and working of a location before the passage of these statutes conferred no rights upon aliens against the United States or its grantees.[91] Under a former decision that an alien could not take even a defeasible title, it was held that an alien could have an interest as *cestui que trust* in the stock of a mining corporation without affecting the title of the trustee.[92]

We thus see by way of summary, that Congress has full power to dispose of the public domain. It has allowed aliens to purchase the public lands on the same terms as citizens; it has granted them pre-emption and homestead rights upon declaration of intention to become citizens, though in the latter case, full title might not be acquired until complete citizenship had been attained.

The result of this liberal policy has been the attraction of great numbers of immigrants from Europe who have settled upon the public lands and in time have generally become American citizens.

Congress has exercised its constitutional power over territories to exclude aliens from holding real estate therein. This was done by the law of 1887. The next year, this act was modified so as to allow foreign governments to own their legation grounds in Washington; in 1897, it was so changed as practically to repeal its common law provisions and to place the territories on the same basis, as to alien land holding, as prevailed before the act of 1887 was passed; and, finally, in 1905, the District of Columbia was placed on the same footing, in this matter, as the territories.

Thus, the movement to restrict alien land holding in this country failed, and in view of the general tendency with regard to the treatment of aliens it is not likely to be attempted again. Some of the western states, however, may enact such legislation with reference to particular aliens, like the Japanese.[93]

[90] *Manuel v. Wulff*, reversing 9 Mont., 279.
[91] *Lee Doon v. Tesh*, 68 Cal., 43.
[92] *Princeton Min. Co. v. Butte First National Bank*, 7 Mont., 530.
[93] See an article by the writer in "The World Today," March, 1909, on "The Anti-Japanese Legislation."

IV. Rights of Resident Aliens

Treaty Provisions—The federal constitution provides that: "This constitution and the laws of the United States which have been made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[1]

It would seem that the treaty-making power of the federal government is derived not only from the express grant of power conferred by the constitution, but that it is also an attribute of sovereignty possessed by every independent government, and that it consequently extends to every subject which can legitimately be made the basis of negotiation and contract by sovereign powers. It can be exercised whenever foreign relations of any kind are established with any other sovereign power for regulating the use, descent, or possession of property which would otherwise be within the exclusive jurisdiction of the states. The treaty-making power of the federal government is not confined, therefore, within the limits of the legislative power of that government; that can be done by treaty which cannot be done by act of Congress.[2] Nevertheless, the power of Congress to legislate is broad enough to carry into effect the provisions of treaties depending upon such legislation for their enforcement.[3] It follows that acts of Congress enforcing treaty stipulations are constitutional when they would be unconstitutional as infringing upon the power reserved to the states, if made in the absence of treaty stipulations.

If the treaty-making power of the federal government is thus

[a]This is the last of a series of four papers. See ante p. 27, also Vol. III., pp. 493 and 565.

[1]As the power of the federal government over aliens is vested exclusively in the political branch of the government, it may be exercised either through treaties made by the President and the Senate, or through statutes enacted by Congress. *Chan Gun v. U. S.*, 9 App. Cas. D. C., 290; *Ekiu v. U. S.*, 142 U. S., 651.

[2]For example, fishing rights within the three mile limit of one of our states can be so regulated.

[3]See Amer. L. Reg., Feb., 1907.

practically unlimited, it is superior to the constitution and laws of any individual state and can, *protanto*, nullify the domestic institutions of a state, thus accomplishing indirectly what could not be done directly. The provisions in a state constitution or legislation which in any way conflict with the treaty stipulations must give way to the latter or to the act of Congress made in pursuance thereof, even though the provisions relate to matters ordinarily within state jurisdiction.[4] The supreme court has never failed to uphold treaties as being the supreme law of the land, even though the provisions extend to the regulation by international agreement of matters which are otherwise exclusively within the control of the states. Speaking of this power, Mr. Justice Swayne has well said:[5] "If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the states are expressly forbidden to 'enter into any treaty, alliance, or confederation.' It must always be borne in mind that the constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is the fundamental principle in our system of complex national politics."[6]

It follows from what has been said that Congress possesses the power, by means of treaties entered into with foreign nations, to control the holding by foreigners of property within the limits of our states. Writing to Aristarchi Bay, on May 19, 1874, Mr. Fish, Secretary of State, in explaining our practice in regard to such matters, said:

"The estates of decedents are administered upon and settled in the United States under the laws of the state of which the decedent was a resident at the time of his death, and on this account, in the absence of any treaty regulations on the subject, interference in the disposition of such measures as may be prescribed by the laws of the particular state in such cases is not within the province of the federal authorities."

This leads us to a study of the treaties that have been entered into by our government to see to what extent they have controlled the right of aliens to have, hold, and convey property within the United States when, on account of their alienage, they would otherwise have been unable to do so.

The first important case involving treaty relations came before

[4]*Watson v. Donnelly*, 28 Barb., 653; *Gordon v. Kein*, I Wash. C. C., 322; Butler, The Treaty-Making Power, vol. I., sec. 3.

[5]*Hauenstein v. Lynham*, 100 U. S., 483.

[6]It has been frequently held that a treaty made subsequent to an act of Congress supersedes the latter, if in conflict with it, (*Ware v. Hylton*, 3 Dall, 199; *Fisher v. Harden*, 1 Paine, C. C., 55), and the converse also holds, that an act of Congress subsequent to a treaty, overrides the latter, and is enforced as the supreme law of the land. (*Taylor v. Martin*, 2 Curtis, C. C., 454; *Ropes v. Clinch*, 8 Blatch, 304; 5 Op. A.-G., 345.)

the supreme court in a cause involving the definitive treaty of peace of 1783 with Great Britain. Art. IV. of that treaty stipulated that the creditors should meet with no lawful impediment to the recovery of debts; Art. V., that Congress should recommend to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties belonging to British subjects which had been confiscated; and Art. VI., that there should be no further confiscations.

The point which came before the court in *Ware v. Hylton*[7] in 1796, was whether the provisions of this treaty of 1783 overrode the state statutes in regard to the collection and confiscation of antebellum debts owed by Americans to British citizens. To the plea that the debt due by citizens of Virginia to a British subject had been abrogated by war and confiscated by the state of Virginia as a war measure, the plaintiff set up in reply the provisions of the treaty of 1783, and the ratification by the constitution of the United States, making it the supreme law of the land and therefore paramount to state legislation, whether past or future. This contention of the plaintiff's was upheld by the court and this *cause celebre* then became the leading authority on the subject of treaty-making power and state enactments for a century to come. The court declared that * * * "a treaty cannot be the supreme law of the land, if any act of the state legislature can stand in its way. * * * It is the declared will of the people of the United States that every treaty, made by the authority of the United States, shall be superior to the constitution and laws of any particular state. * * *." Commenting upon this case, Mr. Justice Baldwin later said:[8]

"In *Ware v. Hylton* it was held that the treaty of peace repealed and nullified all state laws by its own operation, revived the debt, removed all lawful impediments, and was a supreme law which overruled all state laws on the subject, to all intents and purposes; and is of equal force and effect as the constitution itself."

In the Jay treaty of 1794, with Great Britain, Art. IX. provided that British subjects holding lands in the United States should not be considered as aliens so far as respects those lands and the remedies incident thereto. It was necessary that the party should show that the title to land for which the suit was instituted was in him or his ancestors when the treaty was made.

The construction of these two treaties (1783 and 1794) came before the supreme court for adjudication in the celebrated case of

[7]3 Dall., 199.
[8]14 Pet., 353.

Fairfax v. Hunter,[9] in 1812. Mr. Justice Story who delivered the opinion of the court, declared that as the possession and seizin of the property in question had continued up to and after 1794, the treaty of that year, being the supreme law of the land, confirmed the title to the alien devisee through whom the plaintiff claimed and protected his heirs and assigns from forfeiture. He says:

"It was once in the power of the commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself or its grantees. But it has not so done, and its own inchoate title (and of course the derivative title, if any, of its grantee) has by the operation of the treaty become ineffectual and void. It becomes unnecessary to consider the argument as to the effect of the death of one of the parties during the suit; because, admitting it to be correctly applied in general, the treaty of 1794 completely avoids it."

In the case of *Brown v. Sprague*,[10] it was held that, although lands possessed by British subjects in New York under the sixth article of the treaty of 1783 might be transmitted by descent to a citizen, they could not, upon the death of such British subject, previous to the treaty of 1794, pass by descent to an alien born after July 4th, 1776. But a British subject, holding lands in the United States and coming within the ninth article of the treaty of 1794, had the right to convey and devise lands to aliens as well as to citizens.[11]

In the treaty concluded between the United States and Great Britain March 2, 1899, there is contained the following provision:

"Art. I. Where, on the death of any person holding real property (or property not personal) within the territory of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate, or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn."

"Art. V. In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall, in the dominions of the other, enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nations."

In *Blight v. Rochester*[12] it was held that British subjects born before the Revolution were incapable of inheriting lands in the United States, except by force of some treaty, and prior to this convention of 1899, the treaties of the United States with Great Britain contained "no stipulations relative to the tenure of real estate, except the temporary provision of Art. IX. of the treaty of Novem-

[9]7 Cr., 603.
[10]5 Den., 545.
[11]See *Watson v. Donnelly*, 28 Barb., 653.
[12]7 Wheat., 535.

ber 19, 1794.[12a] "It has been held, however, that so far as it went, Art. IX. of the treaty of 1794 was permanent in its nature."[13] The provision of this treaty of 1899 came before the superior court of Delaware in the case of *Dockstader v. Roe*,[14] in 1903. A citizen of Delaware had died intestate in 1901, seized in fee of certain real estate. His next of kin were residents and subjects of Great Britain who claimed an interest in the estate under this convention of 1899. The defendant claimed the whole of the land under the laws of Delaware,[15] which declared that it should be no objection to the next of kin taking land by virtue of the intestate law of the state, that they were aliens, if at the time of the death of the intestate, they resided within the United States. In interpreting the treaty and its effect upon the prior state law, Chief Justice Lore, speaking for the court, said:

"In applying the ordinary rule of interpretation to the plain purpose and scope of the treaty, it seems to us that section one of the treaty contemplates the elimination of the disqualification of alienage in the next of kin, so far as it relates to the subject matter of this suit, and puts the next of kin on the same footing as if they were all residents of this state at the time of the death of the intestate. In our judgment the treaty controls this case, and is paramount to our statute."

In the treaty with France of 1778, Art. XI. read as follows:

"The subject, people, and inhabitants of the said United States, or any of them, shall not be reputed *aubains* in France and consequently shall be exempted from the *droit d' aubains*, or other similar duty, under what name soever. They may by testament, donation, or otherwise, dispose of their goods, movable and immovable, in favor of such persons, as to them shall seem good, and their heirs subjects of the said United States, residing whether in France or elsewhere may succeed them *ab intestato*, without being obliged to obtain letters of naturalization * * * and the said heirs shall be exempt from all duty called *droit detraction*, or other duty of the same kind, saving nevertheless the local rights or duties as much and as long as similar ones are not established by the United States, or any of them. The subjects of the most Christian King shall enjoy, on their part, in all the domains of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present article, but it is at the same time agreed that its contents shall not affect the laws made, or that may be made hereafter in France against emigrations, which shall remain in all their force and vigor, and the United States, on their part, or any of them, shall be at liberty to enact such laws relative to that matter as to them shall seem proper."

The interpretation of the provisions of this treaty came before the supreme court in the case of *Chirac v. Chirac*,[16] in 1817. A Frenchman had died in Maryland, seized of certain real estate, which he had acquired after naturalization. His heirs being French

[12a]Mr. Porter, Act. Sect. of State, to Messrs. Stryker and Campbell, Aug. 2, 1887.

[13]*Sutton v Sutton*, 1 Russ. and M., 663; *Society, etc. v. New Haven*, 8 Wheat., 464; Moore, Intern. L. Dig., IV., 40.

[14]55 Atl., 341.

[15]Rev. Code, 1852, amended 1893, c. 81, sec. 1.

[16]2 Wheat., 259.

citizens, the state of Maryland claimed that the lands were subject to escheat and proceeded to convey them to a natural son of the deceased who resided within the state. Maryland also passed an act permitting the lands of a French subject to descend to next of kin, provided they should be conveyed to a citizen of Maryland within ten years. The legitimate heirs of Chirac pleaded the treaty and brought suit against the grantee of the state. Their contention was upheld by the court, Chief Justice Marshal saying:

"It is unnecessary to inquire into the consequences of this state of things, because we are all of the opinion that the treaty between the United States and France, ratified in 1778, enables the subjects of France to hold lands in the United States. The direct object of this stipulation is to give French subjects the rights of citizens, so far as respects property. * * * The act of Maryland * * * is a general rule of state policy, prescribing the terms on which French subjects may take and hold lands. *This rule is changed by the treaty.* Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States."

This treaty was limited to eight years. As to the effect of the expiration upon rights which had accrued under it, the Chief Justice further said:

"The terms of this instrument leave no doubt on this subject. Its whole effect is immediate, The instant the descent is cast, the right of the party becomes as complete as it can afterwards be made. The French subject who acquires lands by descent the day before its expiration has precisely the same rights under it as he who acquired them the day after its formation. He is seized of the same estate, and has precisely the same power during life to dispose of it. This limitation of the compact between the two nations would act upon and change all its stipulations if it could affect this case. But the court is of opinion that the treaty had its full effect the instant a right was acquired under it; that it had nothing further to perform; and that its expiration or continuance afterwards was unimportant."

Commenting upon the treaty, in 1879, Mr. Justice Swayne, in *Hauenstein v. Lynham*, 100 U. S., 483,[17] had this to say:

"In *Chirac v. Chirac*, it was held by this court that a treaty with France gave to her citizens the right to purchase and hold lands in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this county. The state law was hardly adverted to and seems not to have been a factor of importance in this view of the case."

Before considering the provisions of the treaties of 1800 and 1853 between the United States and France, reference will be made to the laws prevailing in the District of Columbia when those treaties were entered into. An act of Maryland of 1780 modified the common law so far as to allow a subject of France who had settled in that state and given assurance of allegiance to it, to devise to French subjects, who, for that purpose, were to be deemed citizens of the state. This did not bear upon the point of a subject of France inheriting from any other than a Frenchman domiciled in the state. The act of 1791, likewise, did not do away with the disability of

[17]See also *Carneal v. Banks*, 10 Wheat., 181.

foreigners to take real estate within the state by inheritance from a citizen of the United States.[18]

Art. VII. of the treaty with France of 1800 contained the following provisions:

"The citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation, or otherwise, of their goods, movable and immovable, holden in the territory of the French Republic in Europe, and the citizen of the French Republic shall have the same liberty with regard to goods, movable and immovable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries who shall be heirs of goods, movable or immovable, in the other, shall be able to succeed *ab intestato*, without being obliged to obtain letters of naturalization and without having the effect of this provision contested or impeded, under any pretext whatever; and the said heirs, whether such by particular title or *ab intestato*, shall be exempt from any duty whatever in both countries. It is agreed that this article shall in no manner derogate from the laws which either state may now have in force, or hereafter may enact, to prevent emigration; and also that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be, and the other nation shall be at liberty to enact similar laws."

A case involving this treaty arose in the District of Columbia in 1889 and came before the supreme court in *Geoffroy v. Riggs*.[19] Mr. Justice Field, in interpreting the treaty, said:

"This article, by its terms, suspended during the existence of the treaty, the provisions of the common law of Maryland, and of the statutes of that state of 1780 and 1891, so far as they prevented citizens of France from taking by inheritance from citizens of the United States, property, real or personal, situated therein."

Article VII. of the treaty of 1800 was in force when the act of Congress, of February 27, 1801, was passed, adopting the laws of Maryland. The treaty expired by its own limitations in eight years; and then the statute and common law of Maryland, as adopted by Congress in 1801, were again in full force until a new treaty was concluded between the United States and France, February 23, 1853. The seventh article of that treaty reads:

"In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title, and in the same manner as the citizens of the United States. They shall be free to dispose of it as they please, either gratuitously or for value received, by donation, testament, or otherwise, just as though citizens themselves; and in no case shall they be subject to taxes on transfer, inheritance, or on any others different from those paid by the latter, or to taxes which shall not be equally imposed."

"As to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right."

This raises the question as to whether the District of Columbia is one of the "States of the Union," as contemplated by this con-

[18] *Spratt v. Spratt*, 1 Pet., 343.
[19] 133 U. S., 258.

vention. The supreme court, in interpreting treaties, has more than once declared that these should, whenever possible, be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. So interpreting the treaty, the court held that the District of Columbia was one of the "States of the Union," in the sense of the treaty of 1853; and that the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, wherever existing laws permit, as in the District, of aliens holding such property. The court thought that this construction was supported by the first section of the act of Congress of March 3, 1887, prohibiting aliens from holding real estate in the District of Columbia and the territories. It further said:

"That section declares that it shall be unlawful for any person or persons, not citizens of the United States, or who have not declared their intention to become citizens, to thereafter acquire, hold, or own real estate, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts previously created. There is here a plain implication that property in the District of Columbia and in the territories may be acquired by aliens by inheritance under existing laws; and no property could be acquired by them in the District by inheritance except by virtue of the law of Maryland as it existed when adopted by the United States during the existence of the convention of 1800, or under the seventh article of the convention of 1853."[20]

By the treaty of 1795 between the United States and Spain, it was provided:

"* * * that the inhabitants of the territory of each party shall, respectively, have free access to the courts of justice of the other; and they shall be permitted to prosecute suits for the recovery of their property, etc., and the proceedings and sentences of the said courts shall be the same as if the contending parties had been citizens or subjects of the said (same) country."

Several acts of Congress (that of 1798, that of 1804, putting the territorial government of Louisiana on the same basis as that of Mississippi, and that of 1805, adopting the Ordinance of 1787, in its general terms)confirmed the inhabitants of Louisiana in the possession and protection of their property, while Art. III., of the treaty of 1803 provided that:

"the inhabitants of the ceded territory shall be incorporated in the union of the United States and admitted, as far as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and in the meantime, they shall be

[20]This treaty of 1853 with France, by which citizens of France are entitled to acquire, by inheritance or otherwise, real estate in all respects the same as a citizen of the United States in the states by whose laws aliens are permitted to hold real estate, made inoperative an act passed by the State of Nebraska in 1889, prohibiting non-resident aliens from acquiring realty by inheritance, for, by the laws of Nebraska aliens were permitted to hold realty. (*Bahuaud v. Bize*, 105 Fed. Rep., 485.)

maintained and protected in the free enjoyment of their liberty, property, and the religion they profess."

The provisions of these treaties and acts came before the supreme court for adjudication in the case of *Pollard's Heirs v. Gaius Kibbé*, in 1840. In this case, Mr. Justice Baldwin said:[21]

"From the moment of such incorporation (*i. e.* of the Louisiana territory into the domain of the United States), the constitution of the United States and its amendments interposed between the inhabitants and the legislative power of the United States the same guarantee which any citizen of any other state had a right to claim for the enjoyment of his property; and every proprietor, alien or citizen, had the same constitutional right to invoke the protection of the judicial power of the state or union against the invasion of his rights of person or property wherever he might be located. * * * By the very and sole act of such incorporation, the inhabitants became citizens of the United States, their property was protected and alien proprietors became entitled to all the rights secured to them by any treaty between their sovereign and the United States." (The Justice then states "that on this state of things the treaty of 1819 had no influence.")

The treaty with Spain of July 3, 1902, contained the following provision:

"Where, on the death of any person holding real property (or property not personal) within the territories of one of the Contracting Parties, such real estate would, by the laws of the land, pass to a citizen or subject of the other were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render is necessary, and to withdraw the proceeds thereof without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which said proceeds may be drawn.

"The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

"In the event that the United States should grant to citizens or subjects of a third Power the right to possess and preserve real estate in all the states, territories, and dominions of the Union, Spanish subjects shall enjoy the same rights; and, in that case only, reciprocally, the citizens of the United States shall also enjoy the same rights in Spanish dominions."

In the treaty between the United States and Switzerland, concluded November 25, 1850, (ratified in 1855), the fifth article provided as follows:

"The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other by sale, testament, donation, or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property or inherit it, and they may take possession thereof either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors,

[21]14 Pet., 351.

the same care shall be taken by the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

"The foregoing provisions shall be applicable to real estate situated within the states of the American Union, or within the cantons of the Swiss confederation, in which foreigners shall be entitled to hold or inherit real estate.

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the state or in the canton in which it may be situated, there shall be accorded to the said heir, or other successors, such terms as the laws of the states or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the Government any other charges than those which in a similar case would be paid by an inhabitant of the country in which the real estate may be situated."

When this treaty came before the supreme court of the District of Columbia,[22] the court said:

"The clear intent of this clause of the treaty, therefore, we think is that a citizen of one country may dispose of his property in the other, and that on his death, his heirs, who may be citizens of the other, shall inherit his personal property wherever it may be, and the terms "said property" mean said personal property without the limitation of being within the jurisdiction of the other party.

"It will be presently seen, however, that the treaty clearly means to give the right to inherit where it does not exist already and also where there may be no right to hold if inheriting it. Therefore, it cannot intend to place the property in places where there is already a right to hold it by inheritance."

This treaty of 1850 came before the supreme court of the United States also in *Hauenstein v. Lynham*,[23] in 1879. The point involved was whether or not a state law, in conflict with a treaty, must give way. Hauenstein, a citizen of Switzerland, had died in Virginia in 1861, intestate and without issue. The common law prevailed in Virginia at that time so far as to make aliens incapable of taking by descent or inheritance. Therefore, for want of an heir capable under the statutes of the state of inheriting the lands whereof Hauenstein had died, seized in fee, they were sold by an escheator. Thereupon Hauenstein's next of kin, a citizen of Switzerland, filed a petition to recover the proceeds of the sale. After construing the treaty and observing that all treaties made under the authority of the United States are the superior law of the land, the court held that the incapacity of the plaintiff as an alien was so far removed as to entitle him to recover and sell the lands, and withdraw and export the proceeds thereof; and that his rights thus secured were not barred by the lapse of time, inasmuch as no statute of Virginia prescribes the term within which they must be asserted.

By the formation of the German Empire, in 1871, the treaties formerly entered into between the United States and the independent

[22] 1 Mackey, 487.
[23] 100 U. S., 483.

German governments, now embraced in the Empire, were not impaired, because the sovereignty of these states is considered not to have been impaired.[24] It follows that in regard to Germans, their treaty rights are such as proceed from their being subjects of particular German states, not as subjects of the German Empire.

In the treaty entered into with the Hanseatic Republic in 1827, it was provided that the citizens of each of the contracting parties should have power to dispose of their personal goods, within the jurisdiction of the other, by sale, donation, testament, or otherwise; * * * "and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance, on account of their character of aliens, there shall be granted to them a term of three years to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, and exempt from all duties of detraction, on the part of the government of the respective States."

The provisions of this treaty came before the Illinois Supreme Court, in 1893, in the case of *Schultze v. Schultze*,[25] The deceased was a citizen of the United States and died seized of land in Illinois, after the passage of a law by the Illinois legislature in June, 1887, making non-resident aliens incapable of acquiring land, either by descent, device, purchase, or otherwise. His heirs were (in part) citizens of the Republic of Bremen. Mr. Justice Magruder, interpreting this treaty for the court, said:

"If the language of Art. VII. be given a liberal construction, it may be held to mean that, where a citizen of the United States dies intestate owning land and leaving non-resident alien kindred residing in and citizens of Bremen who would be his heirs but for their alienage, there will be granted to such kindred the term of three years within which they may dispose of such land and remove the proceeds * * * The appellees are therefore entitled, under Art. VII. of the treaty, to the privilege of selling the interest in the land in controversy which they would have inherited from the deceased under the laws of Illinois, but for their alienage, and of removing such proceeds of sale, provided they do so within three years."

After providing for the disposal of personal estates by will or otherwise, the treaty entered into between the United States and Prussia in 1828 continued:

"And where on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation and exemption from all duties of detraction, on the part of the government of the respective States."

In May, 1896, the legislature of New York passed a law granting to aliens the right to hold real property within the state on proof

[24]Re Thomas, 12 Blatch., 370.
[25]144 Ill., 290.

of reciprocal treatment in the alien's country. Shortly afterwards, a naturalized citizen of the United States died in New York, leaving all his real and personal property in that state to a sister, a German subject, residing in Prussia. As to the relation existing between the United States and Prussia on this point, the Department of State said: "The reciprocal right of the citizens or subjects of the one country to succeed to and take possession under testament, donation, or otherwise, of property situated in the other country, is regulated by Art. XIV. of the treaty of 1828. * * * The laws of Prussia are understood to permit aliens to acquire both personal and real property and to possess equal rights with natives as participators in an inheritance."[25a]

The treaty between the United States and the German Empire, made Dec. 11, 1871, shortly after the formation of that empire, contained the following provision:

"In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay if they were citizens of a country in which the property is situated or the judicial administration of the same may be exercised."

This provision, prohibiting discriminating duties on inheritances, merely recognizes existing rights and does not confer a right of inheritance where it has not been granted by treaty. The United States had, at the time, no treaty with Baden, covering this point, and the treaty with the German Empire, of which Baden, after 1871, formed a part, conferred no new rights so far as the power to take, hold, or dispose of land was concerned.

When, therefore, Alexander Wunderle, a naturalized citizen, died intestate in 1891, seized of land in Illinois, a distributive share in the estate was claimed by a brother and a sister, subjects of Baden, whose claim was disputed by the widow, a citizen of the United States, on the ground that the Illinois law of 1887 regarding alien ownership of land prohibited any such inheritance as is here claimed. That act declares that a "non-resident alien * * * shall not be capable of acquiring title to or taking or holding any lands or real estate in this state by descent." This case was decided by the Illinois Supreme Court in 1893.[26] The court held that the state statute was not invalidated by treaties between the United States and foreign powers, except in regard to citizens of countries who are, by treaty, given the right of inheriting and holding land in the United States, and that this was not true of Baden and its subjects. Mr. Justice Magruder, in concluding the opinion of the court, said:

[25a]Mr. Day, Assist. Sec. of State, to Mr. Kemper, Oct. 21, 1897.
[26]*Wunderle v. Wunderle*, 144 Ill., 40.

"Inasmuch, therefore, as the appellants cannot inherit from their deceased brother by reason of their alienage, the interest in the land, which would otherwise have gone to them, descends to the next of kin competent to take under the statutes of Illinois. We are of the opinion that the appellee must be regarded as such next of kin. * * * Our conclusion upon the whole case is that the act of 1887 is a valid law, in the respects herein indicated, except as to those aliens who are relieved from the effects of its operation by existing treaties between the United States and the countries of which such aliens are citizens or subjects."

In a treaty between the United States and Sardinia, of November 26, 1838, it is provided that "Where, on the death of any person holding real estate within the territories of one of the contracting parties, such real estate would by the laws of the land descend on a citizen or subject of the other party, who by reason of alienage may be incapable of holding it," such citizen or subject is "allowed a reasonable time to sell such real estate; and to take away the proceeds without paying any other taxes than those to which the inhabitants of the country where the real estate is situated are subject in like cases." "This provision may be thought to cover the case of a Sardinian subject, who has become a citizen of the United States, but whose heirs are Italian subjects and reside in Italy. It may be argued, however, that the stipulation is only for the benefit of those aliens who, but for their alienage, would take by the laws of inheritance, and that it does not embrace those who take in virtue of an express device."[27] The treaty made with Italy, Feb. 26, 1871, supersedes that with Sardinia of 1838, and provides that in respect of real estate the citizens and subjects of the contracting parties shall be treated as are the subjects of the most favored nations.

It is interesting to note that the opinion was once advanced in government circles that the federal government did not possess the right to make a treaty that would interfere with the domestic institutions obtaining in the different states. Attorney-General Wirt, writing to the Secretary of State, July 30, 1819, says: "* * * nor is there any power in the general government, as I can see, to alter, either by law or treaty, the provisions of the particular States in this respect."[28] Somewhat later in *Prevost v. Greneau*[29] the court said: "* * * it is proper to say that the obligation of the treaty and its operation in the state depend upon the laws of Louisiana. The treaty does not claim for the United States the right of controlling the succession of real or personal property in the state."[30] The

[27]Moore, Int. L. Dig., IV. 41, quoting from Mr. Fish, Sec. of State, to Count de Colobiano, in 1870.

[28]1 Op. A.-G. 275.

[29]19 How. 1.

[30]About the same time, it may be noted, treaties were being made without any regard to the states' laws.

view here advanced did not receive general approval, however, but it again came into vogue about 1850, and the treaties of that period proceed on the principle that the federal government must not interfere with the disposition of land by the states, as witness the treaties (*supra*) with France in 1850, Brunswick 1854, and Switzerland, 1850 (ratified 1855).

This doctrine was discredited in 1857 in the opinion of Attorney General Cushing[31] who said that "the government of the United States had constitutional power to enter into treaty stipulations with foreign states for the purpose of restricting or abolishing the property disabilities of aliens, or their heirs, in the several states." Since that time it has been accepted as established that the federal government has power to regulate all matters of an international character properly the subject of negotiation between our government and other nations. As late as 1886, however, Secretary Bayard referred to this matter in the following words: "Were the question whether a treaty provision which gives to aliens rights to hold real estate in the state to come up now for the first time grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the federal government, and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other contracting powers, it may be municipally inoperative because it deals with matters in the states as to which the federal government has no power to deal. That a treaty, however, can give to aliens such rights has been repeatedly affirmed by the Supreme Court of the United States."[32]

In speaking of the treaty-making power of the federal government as not requiring any state legislation for carrying out its provisions, Butler says:[33]

"So far reaching is this treaty-making power that the author unhesitatingly condemns the policy which has occasionally been adopted by the United States of avoiding absolute treaty stipulations as to matters within the jurisdiction of the several states, but at the same time stipulating to urge the States to enact legislation necessary to obtain the desired results. Such method is not only unnecessary, but is also undignified; in many cases, the results are not only unsatisfactory, no distinct obligations being created, but they are frequently productive of injustice. A general concession for the benefit of the entire Union and all of the inhabitants thereof may be lost by the refusal of the legislature or people of a single state to adopt necessary legislation; in fact, history shows that Art. VI. of the Constitution, which makes treaties the supreme law of the land, was undoubtedly framed and inserted in the Constitution for the special purpose of

[31]8 Op. A.-G., 411.
[32]160 M. S., Dom. Let., 441; See also Cent. L. Jour., vol. 43, 216.
[33]Treaty-Making Power of the United States, sec. 4.

preventing exactly that class of treaty stipulations which, under the Confederation, had been tried on several occasions and found wanting in every instance.''

As a summary of the treaty provisions on this point[34] we may divide the European countries with which the United States has treaties, or has not treaties, in regard to the right to hold real estate, into three groups:

With the following countries there are no treaties in force: Baden, Belgium, Denmark, the German Empire,[35] Greece, the Netherlands, Norway, Portugal, Sweden.

With the following countries we have treaties of doubtful construction: France, (the effect of the treaty of 1853 has been noted) Switzerland (likewise, the effect of the treaty of 1850 has been considered.)

With these countries their citizens are fully protected by treaties: Great Britain; certain of the German states, as Prussia, Bavaria, Hesse, Saxony, Wuertemburg, the Republics of Hamburg, Lubeck, and Bremen, Mecklenburg-Schwerein, and Oldenburg; Italy; Servia; Russia (Art. X., treaty of 1832); Spain; and Austria Hungary (Art. X., of the treaty of 1848, grants ''two years which may be reasonably prolonged according to circumstances.'')

These treaties generally grant to subjects of the foreign power, who, but for their alienage, would be entitled to acquire the lands in question, the right, notwithstanding alien disabilities of the *lex rei sitae*, to acquire lands in the states and territories and in the District of Columbia.[36] The estates so acquired, though held by the alien, as if by a citizen, are defeasible, under the condition that the lands acquired under them must be sold to a person able to hold them, and within the times provided for in the treaties.[37] The power to sell, provided for in the treaties, is a property right and not a mere personal privilege.[38] If the conditions of the treaty are broken, the lands will not immediately escheat to the state, but a special proceeding, corresponding to inquest of office found, is necessary to vest the title in the state, especially where the treaty gives a reasonable time in which to sell the land.[39] It would seem that where a non-resident alien owner dies before having sold the land acquired under a treaty, the provisions of these treaties warrant the conclusion that the lands

[34]Using the treaties in force April 28, 1904.
[35]See p. 137.
[36]*Johnson v. Elkins*, 1 App. D. C., 430; *Jost v. Jost*, 1 Mackey, 486.
[37]*Chirac v. Chirac*, 2 Wheat., 275; *Schutlze v. Schultze*, 144 Ill., 290.
[38]*De France v. Howard*, 1 Fed. Rep., 776.
[39]*Wunderlee v. Wunderlee*, 144 Ill., 40; *Society etc. v. New Haven*, 8 Wheat., 492; *Slater v. Mason*, 15 Pick., 345.

descend to his non-resident heirs protected by a similar treaty.[40] Under a device to an executor in trust to sell the land and turn over the proceeds to the alien, the doctrine of conversion will be applied, thus avoiding the violating of any statute, like that of 1887. The alien non-resident may thus enforce his rights to the proceeds and compel a sale by the executor and so avoid all questions of title or escheat.[41]

It would thus seem that great advance has been made over the former harsh method of treating aliens. The law is now construed much more favorably as to alien disabilities than during the time when a low state of commercial intercourse and civilization regarded all foreigners as barbarians. To exclude a citizen from taking lands by inheritance merely because he traced descent through deceased aliens, in accordance with the harsh doctrine of the *droit d' aubaine*, seems not to have been founded on any sound principle of public policy and the principle of "placing the foreigner in regard to all objects of navigation and commerce upon a footing of equal favor with the native citizen" is eminently conducive to international comity, and is winning its way into universal acceptance. The medieval doctrine that the laws of a state operate only in favor of citizens should not be permitted to obtain in modern times and civilized countries. The laws should protect aliens acquiring land by operation of law and in collecting their debts, as is now the rule in most of our states and in most of the civilized nations of the world. To place aliens under such favorable circumstances has been the object of the treaty provisions which we have just been considering.

As to the treaties with China and Japan only a word need be said. While these treaties have attempted to secure to the subjects of those empires the same rights in our country as the nations of Europe have, the working out of this relation has been quite different. Ever since the large influx of Chinese laborers into the Pacific Coast states, in the late 60's and 70's, giving rise to an acute Chinese 'question,' the subjects of the celestial Empire, particularly, have been treated differently from other aliens. Up to 1880, the treaties between the United States and China provided for reciprocal rights of emigration, travel, and daily pursuit of business and labor. Thus, in the treaty of 1868 we find this provision:

"The United States of America and the Empire of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their

[40] *Manuel v. Wulff*, 152 U. S., 506; *Maynard v. Waynard*, 36 Hun., 227; *Chirac v. Chirac*, 2 Wheat., 276.

[41] *Craig v. Leslie*, 3 Wheat., 563; *Comm. v. Martin*, 5 Munf., 117.

citizens and subjects respectively from one country to the other for purposes of curiosity, of trade, or as permanent residents.''

Again it was provided that:

"Citizens of the United States, visiting or residing in China, shall enjoy the same privleges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nations; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nations.''

The Chinese came in such numbers and aroused such antagonism during the seventies that much hostile legislation, some of it in violation of their treaty rights, was enacted by the states and local governments affected by the influx. Such legislation, in so far as it was plainly discriminatory and in violation of the rights secured to them by existing treaties, was declared unconstitutional whenever it became before the federal courts. This situation led to a new treaty with China in 1880, which read:

'Art. I. Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

''Art. II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

''Art. III. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaties.''

The antagonism and disorder due to the presence of Chinese laborers[42] led to a new treaty in 1894 by which such persons were absolutely prohibited from coming to the United States for a period

[42]''References on Chinese Immigration'' (1904) by P. C. Griffin, Library of Congress, is a complete guide to material on this subject. In particular there may be consulted the Report of the Senate Committee of the California Legislature (1877); 44th Cong., 2d ses., S. R., Nos. 689-1281; 46th Cong., 2 ses., H. R., No., 572; 48th Cong., 1st ses., Sen. Exec. Doc., Ho. 62; 49th Cong., 1st ses., House Exec. Doc., pt. 5, vol. II., 1223, 1284; ''Chinese and the Chinese Question,'' (1888) Whitney

of ten years, though its provisions were not to affect the rights of officials, teachers, students, merchants or travellers to come and reside as formerly. If neither nation gave notice, the treaty was to run for a further period of ten years.[43]

In the convention of Nov. 22, 1894, between the United States and Japan, it is provided that:

"The citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel, or reside in any part of the territory of the other Contracting Party and shall enjoy full and perfect protection for their person and property. * * * In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatever which they may lawfully acquire, the citizens and subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects of the most favored nation."

It is further provided, however,

"that the stipulations contained in this and the preceding Article do not in any way effect the laws, ordinances, and regulations with regard to trade, the immigration of laborers, police and public security, which are in force or may hereafter be enacted in either of the two countries."

The provisions of this treaty became a matter of concern in the recent Japanese school question at San Francisco. The Japanese contended that the rights and privileges of education are incident to residence and travel, and that the denial of such privileges on the terms enjoyed by the subjects or citizens of the most favored nations was contrary to the provisions of the treaty.[44]

PROTECTION OF ALIENS.—Having seen what rights existing treaties gave resident aliens, it is proposed now to consider how the rights guaranteed are actually secured, and especially what legislation Congress has enacted or has proposed to enact in order to carry out the treaty provisions. Reference has already been made to the general rights regarding the protection of person and property which aliens enjoy under the law of nations. Here our consideration is limited chiefly to such rights as are granted by treaty.

It is a fundamental principle in international law that a state is responsible to other states for its actions or non-actions. This arises out of the duty, correlative to the right which a state has of controlling its foreign relations. If, therefore, a state enters into a treaty it becomes responsible for the infractions of that treaty

[43]By the act of April 29 1902, (33 Stat. 428) all laws in force at that time, affecting Chinese were continued without limitation of time.

[44]The points here involved are discussed fully in subsequent pages.

throughout its territory and cannot escape liability on the plea that some local authority has failed to act.[45]

As the power of our states over aliens is limited by the federal constitution and treaties, they cannot exclude aliens from entering their territory, or limit their right to carry on foreign commerce, nor exclude them from common occupations not requiring special skill or moral qualifications. "Nor is it, generally speaking, competent for the states to deprive resident aliens of any privilege accorded to foreigners by the comity of nations or to discriminate against them when equal treatment is guaranteed by treaty."[46] The Fourteenth Amendment is universal in its application and extends its protection to aliens by the provision "nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[47] This amendment thus prohibits state legislation that is discriminatory or partial, either favoring, or being prejudicial to, particular persons or classes. Equality of protection implies equal accessibility to the courts and equal exemption with others of the same class from charges or burden of every kind.[48] A state may, however, without violating this provision of the constitution, deny to an alien the right to hold real estate (unless protected by treaty),[49] or to sell liquor.[50] It may deny to a Mongolian or Indian the right to testify for or against a white man,[51] and deny to an alien a jury of his own race, provided no discrimination has been shown against him in the selection of the jury.[52]

Secs. 1977 and 1979 of the Revised Statutes are a partial enumeration of the rights and immunities guaranteed by the constitution. The first provides that all persons within the jurisdiction of the United States shall have the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

[45]See Madison to Pinckney, Oct. 25, 1802.
[46]Freund, "Police Power," secs. 705, 706.
[47]*Yick Wov. Hopkins*, 118 U. S., 356.
[48]In re. Lee Sing, 43 Fed. Rep., 359.
[49]*Fairfield v. Hunter*, 7 Cr., 602; *Chirac v. Chirac*, 2 Wheat., 259.
[50]*Tragesser v. Gray*, 73 Md., 250.
[51]*People v. Brady*, 40 Cal., 198.
[52]In re. Jugiro, 140 U. S., 291.

Speaking of the Fourteenth Amendment, the court in *Strauder v. W. Va.*, (100 U S., 303) says: "The Fourteenth Amendment makes no attempt to enumerate the rights it designs to protect. It speaks in general terms and those are as comprehensive as possible Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is the immunity from inequality of legal protection, either for life, liberty, or property."

penalties, taxes, licenses, and exactions of every kind, and to no other.[53] This secures aliens from discriminating exactions of every kind.[54] Section 1979 provides that every person who, under color of any statute or authority of any state or territory subjects any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[55]

Sections 5508[56] and 5510 provide a criminal procedure corresponding to the civil remedies just mentioned. The former of these two sections contemplates the punishment of any one who conspires to injure or intimidate citizens in the exercise of their civil rights. Section 5510 provides that every person who, under color of any state or territorial law, deprives any inhabitant of a state or territory of any right, privilege or immunity secured or protected by the constitution and laws of the United States, or subjects him to different punishments "on account of such inhabitant being an alien" shall be punished by fine, or imprisonment, or both.

In spite of these guarantees and protections contained both in the federal constitution and statutes, resident aliens have often received treatment at the hands of individuals or of mobs, in different states, outraging the rights secured to them by these treaties, and thus causing embarrassment to the government. The latter has always contended that it was not liable for such outrages, as they were in violation of the peace and dignity of the individual states within whose jurisdiction they occurred, and were not, therefore, punishable by the federal government. Evidently, however, there is an inconsistency between the federal guarantee of treaty rights and its unwillingness or inability to protect such rights. Foreign governments must, in such matters, look solely to the federal government, and the acts of mob violence have, on several occasions, given rise

[53]Act May 31, 1870, 16th Stat. 144.

[54]Before this statute was passed, laws had been upheld requirng of all aliens a special license fee for digging in gold mines, (*People v. Naglee*, 1 Cal., 323), and exacting of them an inheritance tax. (*Mager v. Grima*, 8 How., 490.)

[55]Act, April 20, 1871, 17th Stat., 13.

[56]Act May 31, 1870, 16th Stat., 141.

In *Baldwin v. Franks*, (120 U. S., 678) it was held that "citizen" was used in the restricted sense and did not include aliens; and that an indictment brought under this section charging certain persons with a conspiracy to deprive Chinese aliens of the right of residence in California, could not be sustained. While there was no law covering the offense stated, the court strongly intimated that Congress had ample power to provide for the punishment of any offense against rights given to aliens by treaty

to just complaint on the part of nations whose subjects have been injured. In a number of instances, the government has felt compelled to confess to foreign states its inability to furnish the legal redress needed, and has recognized the equity of the demands made upon it for satisfaction by providing indemnities for the families of the afflicted. This was notably true in the case of the Spanish riots, in 1851, and the Italian, in 1891.

The position of the federal goverment in regard to its treaty obligations has frequently been a matter for consideration. In 1837, the Attorney-General[57] advised the President:

"There can be no doubt under the law of nations and independently of any treaty stipulation that alien subjects of a state with whom the United States are at peace, coming within our territory and placing themselves with the consent of the general state governments under the safeguard of our laws, are entitled to be protected in their personal rights, in like manner as citizens, and that it is the duty of the executive of the United States to whom the care of our foreign relations is committed by the constitution to take all lawful measures for the promotion of this end. It is obvious, however, from the principles on which our institutions are founded and the particular structure of our government, that the capacity of the federal executive in this respect will in most cases be limited to the mere duty of taking care that such laws as may have been passed by Congress on the subject be faithfully executed and redress can only be obtained through the courts of justice, or in fit case, by the special interposition of the legislature."[58]

The belief has been growing for many years that the federal government has the power and the duty to provide, by its own legislation, for the carrying out of all its treaty stipulations.[59] The matter came up for consideration, and this time in an insistent form, after the massacre of the Italians at New Orleans in 1891. The Italian government demanded: "(1) The official assurance of the federal government that the guilty parties should be brought to trial; and (2) The recognition, in principle, that an indemnity is due to the relatives of the victims."[60] Our government refused to accede to the demands made upon it (especially as to the first point) and the Italian ambassador withdrew from Washington. Secretary Blaine, in explaining the situation to the Italian *charge d' affair*, said: "* * * the government of the United States is utterly unable to give the assurance which Marquis Rudini has demanded Even if the National Government had the entire jurisdiction over the alleged murderers, it could not give assurance to any foreign power that they should be punished."[61] Mr. Blaine pointed out

[57]3 Op. A.-G., 253. See also Webster "The Law of Citizenship," p. 289.

[58]That alien resident should be indemnified, if it can be shown that the mob could have been suppressed by the exercise of due care, see 2 Whart. Dig., 600; Snow's Int. Law, 181; An. of Am. Acad., II., 69.

[59]See President Grant's message to Congress of Dec. 7, 1875.

[60]For. Rel. 1891, 676.

[61]Ibid., 677.

that the United States did not, by the treaty with Italy, become the insurer of the lives or property of Italian subjects resident here; that the foreign resident must be content to share the same opportunity for redress that is offered by the law to citizens, and has no just cause of complaint or right to ask the interposition of his government, if the courts are equally open to him for the redress of his injuries.

President Harrison, in his message to Congress of December 9th, 1891, referring to the New Orleans affair, spoke of the necessity of protecting aliens in their treaty rights and recommended such legislation as would give the courts of the United States jurisdiction, in the following words.

"It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow in this state of the law, that the officers of the state charged with police and judicial powers in such cases must, in the consideration of international questions, growing out of such incidents, be regarded in such sense as federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights."

In pursuance of the President's recommendation, the matter was taken up in Congress and the following resolution was presented on February 18, 1892 [62]

"* * * * resolved that so much of the President's annual message, communicated to the present Congress as relates to criminal offenses committed within the United States, against the treaty rights of foreigners, domiciled within the United States, be referred to the committee on foreign relations with instructions to report such provisions of law as will empower the federal courts to try all such cases involving the cause of international questions, and with such judicial process as will enable the government of the United States to use its constitutional power to punish acts against such treaty rights as have been conferred on foreigners."

The committe to which the resolution was referred reported as follows:

"If a treaty stipulation be a part of the supreme law of the land, (Art. VI., Constitution) it is not only the right but it is the duty of Congress to provide for its enforcement and for the enjoyment of it by those who are entitled thereto."

The committee brought in a bill which was discussed in the Senate, May 9, 1892. It was drafted on the supposition that Congress had the power to adopt the laws of the several states defining crimes against personal property, and to make them punishable in the courts of the United States. Misdemeanors were not included. The bill provided that where crimes were committed against the person or property of a citizen of a foreign country, they should constitute

[62]Cong. Rec., XXIII., pt. 2, 1266.

crimes against the peace and dignity of the United States, and instead of being prosecuted in the state courts only, they might be prosecuted in the federal courts also. The statutes of the states should define the crime, prescribe the punishment, and furnish the limitations. That is, the bill provided that crimes which were in violation of rights secured by treaty might be prosecuted in the courts of the United States, the same as under existing laws they were punishable in the courts of the states. Thus it is seen that the measure provided for concurrent jurisdiction.

In the debate which took place in the Senate, Senator Morgan stated[63] that the United States enters into treaty obligations with foreign powers for the purpose of protecting their citizens within the limits of our domain. As each one of our states and territories has a separate criminal code of its own, with jurisdiction over life and property, the question arises whether we are to resort to the statutes and courts of the United States to find that protection, or whether we are to resort to the local courts and statutes. The settlement of such causes as have arisen out of this conflict of authority has led to confusion and difficulties between our country and foreign countries and has been the subject of consideration for many years. In the recent serious trouble with Italy the question was whether the government of the United States was bound to protect in its own tribunals the lives of the subjects of that country who might be domiciled here. In that case the United States was obliged to say "We have no law which authorizes the government of the United States or any part of the government of the United States to interfere for the protection of the lives of your citizens." Then, the inquiry instantly arose, "Why did you make the obligation, why did you enter into the contract, why did you engage to protect the lives of our citizens when you have not the power to do so?" Thereupon arose the necessity which this bill attempts to provide for by adopting the statutes of the states and making them the rule of action in the federal courts. The bill is limited to the protection of those rights which are secured to foreigners by treaty. Such rights cannot be protected in any other way than in the courts of the United States, unless the supreme power is left to depend entirely upon state action. The Senator went on to say that when the Italian government demanded of the government of the United States that it should bring to trial the persons who were accused of having violated the international law and the treaty of the United

[63]Cong. Rec. XXIII., pt. 5, 4559.

States with Italy, the government of the United States had to answer: "We have no jurisdiction in the state of Louisiana at all. Congress has not provided that the federal courts shall have jurisdiction of cases within the state of Louisiana except in that class of offenses which pertains to the government of the United States itself."

The Senator stated that the Secretary of State would have to pay $25,000 to the families of the men who had been massacred at New Orleans. This was out of a secret service fund, a fund of $150,000 that was appropriated annually to allow the President to smooth over little difficulties. The government of the United States is in a rather pitiable condition, he said, when its Secretary of State, without the express authority and sanction of law, is compelled to resort to secret service funds to keep peace with the foreign government which alleges, and we admit, that its citizens have been maltreated in this country and that proper redress has not been granted them. Senator Morgan, after quoting the constitutional provision that "The judicial power shall extend in all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority; * * * and between a state, or the citizens thereof, and foreign states, citizens or subjects," said that the question was whether such jurisdiction could be extended to include crimes. The constitution does not seem to confer upon Congress the right to define and punish crimes against the dignity of one of the states, but there could be no objection to taking the law provided in the states for the protection of their own people and of foreigners also, together with the procedure and practice of the state, and make it the law of the United States for the purpose of protecting the rights of a foreigner guaranteed him by treaty when found within the limits of a particular state.

Senator Vest, replying to Senator Morgan, and speaking in opposition to the bill[64] quoted that clause of the Fourteenth Amendment forbidding any state to deprive any person of life, liberty, or property, without due process of law, and of denying to any person within its jurisdiction the equal protection of the laws. By this, the Senator said, an unnaturalized foreigner has the same rights and protection as has a citizen of the United States, and Congress should not enact a statute which would drag a citizen of the United States away from his home and before a federal tribunal where he would

[64]Ibid., 4603.

have no right to a change of venue and where the court charges the jury, simply because there have been cases of violence in some of the states. Senator Turpie said[65] that the bill went far beyond the recommendations of the President, which recommendations he thought were the most radical ever made by a chief executive of this country, and proposed the same legislation for the most transient foreigner that the President had recommended on behalf of domiciled foreigners. As to the statement by the committee in charge of the bill that they were not going to change the law, Senator Turpie said that he could not conceive of any change more radical than to take the construction of the law away from the judges of the states and put it in the hands of tribunals irresponsible to the people of the states.[66]

The chief opposition to this bill in the 52d Congress was not the lack of power on the part of Congress to legislate, but the feeling that it was unnecessary to confer such jurisdiction on the United States courts and, therefore, impolitic to do so, as the prosecution of such offenses could be safely entrusted to the state courts. For these reasons, the measure failed to become law.[67]

On March 23, 1897, the Senate called upon the Secretary of State to inform it as to the sums of money paid by the United States in recent years as indemnity to aliens for personal injuries inflicted or homicides caused by mob violence or illegal arrests; and also to inform it whether or not efforts had been made to secure the reimbursement by the States of the sums so paid by the United States;

[65]Ibid., 4604.

[66]The supreme court had strongly intimated in the case of *Baldwin v. Franks* (120 U. S., 678), that Congress possesses the power to provide for the protection of aliens in the enjoyment of treaty rights, and by analogy, the reasoning in *United States v. Arjona* (120 U. S., 479) would support the same conclusion. In this case the court said: "The national government is * * * made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized 'to define and punish * * * offenses against the Law of Nations.'" Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact because it is one needed to carry into execution a power conferred by the constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing, for here as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of the state, as well as that of the United States."

[67]See "The Position of the Federal Government of the United States in Regard to Crimes Committed Against the Subjects of a Foreign Nation within the States," by J. L. Chamberlin; also Reports of the Amer. Bar Assoc. for 1891, 1892, and 1893.

and if no such efforts had been made to suggest such legislation as seemed best fitted to secure such reimbursements. The Secretary replied[68] that Congress, on February 24, 1887, had appropriated $147,748.74 to be paid the Chinese government for the losses sustained by the Chinese subjects at Rock Spring, Wyoming, September 2, 1875. The act of June 30, 1888, carried with it an appropriation of $276,619.75 to the Chinese government "as full indemnity for all losses and injuries sustained by Chinese subjects within the United States at the hands of residents thereof." On April 12, 1892, the Secretary paid the Italian government $24,330.90 on account of the massacres at New Orleans. The act of June 30, 1896, provided $10,000 to be paid to the Italian government for damages done its subjects in the state of Colorado; $1,000 to Great Britain for injuries to its subjects in Louisiana, and $1,800 for such injuries in Nevada; and $2,000 to Germany. The Secretary reported that no attempt had been made to have the federal government reimbursed, and he himself suggested no procedure.

President McKinley renewed the recommendation for federal legislation in his message of December, 1899, and frequent efforts have been made to the same end by his successors, as President Roosevelt in 1901 and 1906.

In the Senate report of the 56th Congress[69] on the anti-alien outbreaks that had taken place, it is said:

"In each of these instances it was found impossible, on account of local sentiment, to successfully prosecute the perpetrators of these outrages in the local courts, and in most instances it was impossible to even institute a prosecution. In each case the foreign government interested insisted and demanded of the United States that it should assert its authority and bring the offenders to justice, and seemed incapable of understanding why the United States government should be powerless to act directly in the premises."

The committee recommended a bill along the lines of the measure already discussed.

The House Committee on the Judiciary, in its report of May 1, 1900,[70] had the following to say in regard to the procedure by which a foreigner presents his claim against this government for alleged violation of treaty rights:

"At present, there is no method of procedure under the laws of the United States open to any subject or citizen of a foreign state, claiming of the United States indemnities for injury to his person or property under a treaty or under the principles of international law. In default of any better method, claims of this kind are presented by the ambassador or minister representing the government of the claimant to the Department of State. Discussions usually ensue- in some cases prolonged investigatons are had, and finally, if the state department deems advisable as a question of justice or of policy to pay the claim, or

[68]55th Cong., 1st ses., Sen. Doc., II., No. 17.
[69]56th Cong., 1st ses., S. R. II., No. 392.

a part thereof, a communication is sent to the House recommending an appropriation for that purpose. The question must then be examined and passed upon by a committee, upon the report of which action is taken by the House, and afterwards the same course in relation to it is pursued in the Senate."

The committee recommended that such claims be passed upon first, as to their merit, by the Court of Claims, if the foreign government, of which the claimant is a subject or citizen, allows our subjects to sue it.

In spite of the numerous recommendations of those in charge of the conduct of our foreign relations for such legislation, Congress has not seen fit to enact any. One of the most forceful of the recommendations was that of President Roosevelt's of December 4, 1906. In this he says:

"One of the great embarrassments attending the performance of our international obligations is the fact that the statutes of the United States are entirely inadequate. They fail to give the national government sufficiently ample power through United States courts and by the use of the army and navy, to protect aliens in the rights secured to them under solemn treaties which are the law of the land. I therefore earnestly recommend that the criminal and civil statutes of the United States be so amended and added to as to enable the president, acting for the United States government, which is responsible in our international relations, to enforce the rights of aliens under treaties."

Notwithstanding the answer which our government has always made to foreign governments, namely, that the only guarantee provided by the treaty stipulations is that aliens residing in this country should have the same protection under the laws and in the courts as is provided for our own citizens, this sheltering behind a strictly technical position places our government in an embarrassing and undignified position. Commenting upon this position, Professor Hyde has well said:[71]

"If our government in sincerity wishes to do exact justice in its relations with foreign countries; if it desires their esteem and regard, it must be compelled to fling aside as untenable in law, and as unworthy of an enlightened nation, the slightest pretense that lack of necessary legislation or of proper machinery of government is a defense for not fulfilling the functions of government."

So far, the treaty rights discussed have been chiefly those securing the protection of person and property. In the Japanese school question, which arose in San Francisco in 1905-06, there were involved treaty rights of a different kind. It will be recalled that the treaty with Japan, of 1894, (p. 147), provided that the citizens of each country should have full liberty to enter, travel, or reside, in any part of the territory of the other, but that nothing contained in the treaty should affect in any way the laws and ordinances and regulations with regard to police and public security which are in force or which may hereafter be enacted in either of the two countries.

[70]56th Cong., 1st ses., H. R., No. 1176.
[71]Green Bag, XIX., 47.

Such were the rights guaranteed resident Japanese as to travel and residence and the most favored nation treatment, and such the restrictions placed upon those rights in favor of the local police power. The point for consideration is whether the right to residence includes the right to attend the public schools, and if so, whether upon the same terms as American white children. The Civil Code of California[72] gives the trustees power to "establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese or Mongolian children must not be admitted into any other school." On May 6, 1905, the Board of Education of San Francisco passed a resolution to the effect "That the Board of Education is determined in its efforts to affect the establishment of separate schools for Chinese and Japanese pupils, not only for the purpose of relieving the congestion at present prevailing in our schools, but also for the higher end that our children should not be placed in any position where their youthful impressions may in any way be effected by association with pupils of the Mongolian race." And on Oct. 11, it directed the school principals to send the Oriental children to a separate school.

The school system, under the constitution and statutes of California, provides for school privileges for all resident children, whether citizen or alien. All such are included in the basis for estimating the amount to be raised by taxation for school purposes. The fund for the support of the schools is raised by general taxation upon all property of resident aliens as well as of citizens; and all children, whether of aliens or of citizens, are liable to be compelled to attend the schools. Under the resolution just cited, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Japanese, and Chinese were excluded from those schools and were not only deprived of education unless they consented to go to the special schools designated, but were subject to be forcibly compelled to go to that particular school.

The Japanese contended that the treaty right of residence embraced the privilege of attending the public schools, and of doing so upon the terms granted the most favored nation; and that segregating them into a school located in a distant place and difficult of access to small children was a practical denial of the privilege.[73] The Japanese also contended that segregating their children with

[72]Sec. 1662.

[73]This latter contention was practically substantiated by the report of Secretary Metcalf.

Chinese, an excluded race, and with Indians—wards of the nation—makes an invidious social distinction, violating the most favored nation clause of the treaty.

On the other hand, the school authorities contended that the rights granted were clearly and specifically enumerated in the treaty and that the right to free public education is not there included, and that education is not, in any proper sense of the word, incident to travel or residence. But even if it is, equality and not identity of privilege, the Board claimed, was all that could be asked, and this equality of education was granted. It was pointed out that even in the case of our own citizens such equality does not prevent the segregation in the public schools of children of different races.[74] It could not be claimed, of course, that an alien had rights superior to those of a citizen,[75] but only that one race might not be accorded greater advantages than another. The mere fact of segregation would not therefore, violate any rights of citizens or of aliens. The local authorities denied "that the federal government had any control whatever over the schools of this state or any authority whatever to officially deal with them. * * * Secretary Metcalf now here, is not as a United State official entitled to any information whatever in regard to our schools. What is given is given as a result of courtesy. * * * If the United States has no authority over the schools of California, it cannot be clothed with such authority by any contract of its own with a foreign nation. To suppose otherwise could be to suppose that the President and Senate alone could under guise of a treaty with a foreign nation, usurp every power now held by any state government, and even abolish those governments. If the power of the President and Senate to enact by treaty that which Congress and the President cannot enact by law exists, it has no limit. It does not exist. Therefore, whatever engagements the federal government may have made in Japan with respect to our schools—if it has made any—are utterly void."[76]

This rather belated claim of state superiority and local interpretation of treaties was ably answered by Secretary Root, in addressing the First Annual Meeting of the American Association of International Law, when he said:[77]

[74]*Lehew v. Brummel*, 103 Mo., 546; *Roberts v. Boston*, 5 Cush., 198; *Ward v. Flood*, 48 Cal., 36; *King v. Gallagher*, 93 N Y., 438.

If it could be shown that the presence of the Japanese children in the schools engendered friction and led to physicial violence, then the moral welfare and public security would demand the separation of the two races.

[75]Twenty-five of the Japanese children were American-born and therefore American citizens.

[76]The San Francisco Chronicle, Nov. 6, 1906.

[77]Am. Jr. Int. L., I., pt. 1, 273.

"It was assumed that in making and asserting the validity of the treaty of 1894, the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools, or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any state chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made, and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitive. It is not a requirement that the state shall furnish education; it is a prohibition against discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not, as it chooses, but it says to every state 'if you provide a system of education which includes alien children, you must not exclude these particular alien children'."[78]

Secretary Metcalf, who had been sent by the President to California to investigate the conditions arising out of this situation, reported[79] that the Oriental school, on account of its situation, was not being attended by the Japanese children. He also found that there had been many assaults made upon Japanese residents and their property, and that the local authorities had been lax in affording protection. Concluding his report, the Secretary said that if the police power of San Francisco was not sufficient to meet the situation, it seemed to him clearly the duty of the federal government to afford such protection. In President Roosevelt's message to Congress, of December 18, 1906, he stated that the government had directed suit to be brought to test the constitutionality of the act in question, but expressed the hope that such suit would not be necessary, and that as a matter of comity, the citizens of San Francisco would not refuse to permit young Japanese children to go to the schools. The President further said that he had directed Secretary Metcalf to state that if there was any failure to protect the persons and property of the Japanese, that the entire power of the federal government within the limits of the constitution would be used to enforce the observance of our treaty, which guaranteed to Japanese residents everywhere in the union full and perfect protection for their persons and property.

The Japanese school question, the protection of resident aliens, and the extent of the treaty-making power came up for discussion in Congress during the early part of 1907. Commenting upon the

[78]See also a speech by Rep. Foster, 59th Cong. 2d ses., XLI., 1231.
[79]59th Cong., 2d ses., Sen. Doc., 117.

alleged lack of power in the federal government to protect aliens in their rights, Representative Sherley said on Jan. 22, 1907:[80]

"For this nation, then, to be put in the humiliating position of being held responsible by another power for a wrong done upon an alien residing in America and yet be unable to punish the perpetrators of that wrong would be a matter of grave concern to us all and place America in a critical position in the eyes of the world. I plant myself upon this firm proposition, that to the extent that we can confer a right upon an alien, to that extent the national government that confers it ought to have the machinery by which it can punish any violation of that right, and I hope that very shortly this Congress will consider the advisability of passing this or similar legislation."

Representative Foster contended that whether the treaty-making power rests in sovereignty or rests in grant, is an immaterial—an academic question. In opposition to this view, however, it was argued, that if the treaty-making power exists as inherent in government, there is no limit to such power—it is co-extensive with sovereignty itself. It would extend to every subject irrespective of the division of powers among the states and the nation, and among the different departments of the nation. This understanding of the treaty-making power would probably strip of its significance the Tenth Amendment.[81]

The closing paragraph of the treaty with Japan providing that nothing contained therein should effect the laws, ordinances, and regulations with regard to police and public security, then in force or which either country might thereafter enact, made possible legislation to exclude the Japanese laborers from coming to the country and a compromise was reached on this basis. The Senate bill relating to immigration was so amended as to give the President power, whenever he shall have been satisfied that passports, issued by any foreign government to its citizens, are being used to enable the holders to come to the continental territory of the United States to the detriment of labor conditions therein, to refuse to permit such citizens to enter the continental territory of the United States. It was objected to this measure that the power thus lodged in the President might be used as a bludgeon to force a "sovereign" state to

[80]Cong. Rec. 59th Cong., 2d ses., XLI., pt. 2, 1515.

[81]The extent of the treaty-making power does not seem to have been discussed in the Convention of 1787. The Federalist (Nos. 64 and 75) contents itself with showing that the power was properly lodged. In the Virginia state convention, Patrick Henry opposed the constitution on the ground that this power was unlimited, but Madison replied that it was limited to objects truly national. While the supreme court has never declared a treaty to be unconstitutional, it has been frequently asserted by both the courts and Secretaries of State that there are limits, of a fundamental character, to this power. Butler, "Treaty-Making Power," sec. 454; *Geofrey v. Riggs*, 133 U. S., 258; Amer. Jr. Int. L., I., pt. 2, 665; Speeches by Rep. Hayes, 59th Cong. 2d ses., XLI., 1579; and Rep. Webb, Ibid., 3132; and Kahn, Ibid., 3229.

forego its right to maintain separate schools.[82] It was further objected to as being a delegation of legislative power. Its supporters contended, however, that it gave the President power to put an end to two-thirds of all the immigration troubles on the Pacific Coast, and the measure became law on the 20th of February, 1907.[83]

In conclusion, it may be said that the question whether the treaty includes the right to attend school as one of the privileges of residence, has not been passed upon by the courts and is therefor still open. Our government has always insisted that an alleged violation of a treaty by a state should first be tested judicially before being made the ground for diplomatic intervention, though such judicial determination is not binding upon the foreign power. Dr. Maxey, in a study of the Japanese school question, concludes that the treaty actually does include school privileges and on terms with the most favored,[84] and Professor Hyde is inclined to the same view.[85] That the national goverment has the power to grant such a privilege, in spite of the reservation of powers to the state governments by the Tenth Amendment, seems most probable in view of the treaty making power being national and not merely federal, and in the light of the courts' interpretations and dicta as to the extent of the treaty-making power. Whether the action of the San Francisco School Board was a breach of the treaty or only a proper police measure ceased to be a vital question when the United States and Japan came to an understanding by which the Japanese children were readmitted to the schools and Japanese laborers excluded from the country. Note: See an article by the writer in the March, 1909, number of "The World Today" on "The Anti-Japanese Legislation."

EXCLUSION AND EXPULSION OF ALIENS.—Chitty states[86] that "Alien friends may lawfully come into the country without any license or protection from the Crown, though it seems that the Crown, even at common law and by the law of nations * * * possesses a right to order out of the country or prevent them from coming into it, whenever his Majesty thinks proper."[87] In our country the executive possesses no such inherent power, but Congress does possess and has freely exercised the right to exclude or expell.

[82]Rep. Williams, 59th. Cong., 2d ses., XLI., 3222.

[83]34 Stat. 898. As to the effectiveness of the arrangement in keeping out the Japanese see a speech by Rep. Hayes, of California, in the Cong. Rec., 60th Cong., 1st ses., p. 7575.

[84]16 Yale L. Jr. 90; see also Harv. L. Rev., XX., 337.

[85]Green Bag XIX., 38; see also *Chapman v. Toy Long*, 4 Sawy., 36.

[86]Prerogatives of the Crown, 49.

[87]See Amer. L. Rev., XXXIII., pp. 90, 246.

Writers on international law hold that a state, by virtue of its sovereignty, may exclude or return those whom it does not care to admit whenever their presence would menace the peace and security of the state, or when they are liable to become public charges. The right of a state to order a foreigner to leave its territory immediately has been criticised by writers as being either an infraction of the so-called rights of asylum, or as an invasion of the imprescriptible rights of the individual man. The right is maintained, however, as being essential to the preservation of the ends for which the state exists.[88] Thus, for example, Bonfils says:[89]

"A state has the right to expel from its territories aliens, individually or collectively, unless treaty provisions stand in the way. * * * In ancient times, collective expulsion was much practised. In modern times it has been resorted to only in case of war. Some writers have essayed to enumerate the legitimate causes of expulsion. The effort is useless. The reasons may be summed up and condensed in a single word: the public interests of the state. Bluntschli wished to deny states the right of expulsion, but was obliged to acknowledge that aliens might be compelled by a simple administrative measure. An arbitrary expulsion may nevertheless give rise to a diplomatic claim.[90]

In the Ekiu case[91] the court, speaking of our own constitutional system, said:

"In the United States, this power is vested in the national government to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; * * *"

This power which the federal constitution gives to the political branch of the government enables it to expel either particular individuals or classes. The liberty granted in treaties to come to, enter, travel, sojourn, or reside in the United States, whether expressly stated or not, is necessarily understood to be subject to the laws of the land. An act of Congress, therefore, excluding the members of any particular race or nation, subsequent to a treaty granting them the rights of entrance and residence in the country, necessarily takes precedence over the treaty provision. While our policy with regard to aliens has been the most liberal possible, yet our laws have long contained provisions for the exclusion or expulsion of particular classes of undesirable persons.

ATTITUDE OF OUR GOVERNMENT.—Before taking up the con-

[88]See Darut, De l'Expulsion des Etrangers.
[89]Manuel du Droit Inter. Public, sec., 442.
[90]See also Bluntschli Le Droit International Codifie, sec. 868.
[91]142 U. S., 651.

gressional legislation bearing upon the exclusion or expulsion of aliens, reference will be made to the position of the executive branch of our government in insisting upon the right to exercise such power, and in acquiescing in the exercise of such power by foreign governments.

As far back as 1798 Mr. King, our minister to London, intimated to the government of that country that the deportation of certain Irish agitators to America would not be looked upon with equinimity and was assured by the British government that the contemplated step would not be taken.[92] This aspect of the matter was again brought forward in Mr. Bayard's reply of May 7, 1887, to the British minister at Washington, when he said:

"The United States could not fail to look with disfavor and concern upon the sending to this country, by foreign governmental agencies and at the public cost, of persons not only unlikely to develop qualities of thrift and self-support, but sent to the United States because it was assumed that they had 'friends' there able to 'help and support' them. While the mere fact of poverty has never been regarded as an objection to an immigrant, yet persons whose only escape from immediately becoming and remaining a charge upon the community was the expected but entirely contingent voluntary help and support of friends, were not a desirable acquisition to the population, and their exportation hither by a foreign government, in order to get rid of their burden of support, could scarcely be regarded as a friendly act, or in harmony with existing laws"[93]

Writing to Mr. Mann, an American who had been excluded from Russia in violation of treaty stipulations, Mr. Everett, Secretary of State, said, in 1852:[94] "What we denied to other powers, we must disclaim for ourselves; and this government could never give up the right of excluding foreigners whose presence they might deem a source of danger to the United States." Mr. Marcy, Secretary of State, writing to Mr. Gadsen, minister to Mexico, said in 1855:[95]

"It is a sovereign right belonging to every independent power to determine whether it will or will not receive foreigners within its territorial limits as residents and, having granted such permission, it has the same right to determine whether it will or will not revoke it and send such persons out of the country. Nations may, and often do, modify or restrict this right by treaty. * * * As a general principle, governments have the same right to send persons out of their territories as they have to deliver them up in pursuance of stipulations in extradition treaties."[96]

While a state may perform the sovereign act of expulsion, it would seem that it should do so only when the alien's presence is against the public good; that proof or evidence of this should be given

[92]7 M. S., Desp. Eng., 1798.

[93]For a later expression of the same views, see Mr. Hay, Sec. of State, to Mr Wilson, minister to Roumania, July 17, 1902.—For. Rel. 1902, 910.

[94]41 M. S. Dom. Let. 138.

[95]M. S., Inst. Mex., XVII., 54.

[96]See also Mr. Marcy to Mr. Frye, our minister to Switzerland, in 1856. M. S. Inst. Switz., I., 79; and Mr. Bayard to Mr. Lathrop, minister to Russia, in 1887. M. S. Inst. Russia, XVI., 518.

to the party affected, in order that he may overcome, if possible, the falsity of the accusation; and that he should be given a reasonable time within which to settle up his business affairs. The only justification for immediate expulsion would seem to be that the presence of the alien had become so inimical to the public welfare that his continued residence, though for a limited time, would so endanger the state that it could not well be granted. And, finally, the grounds for the expulsion should be communicated to the government of which the expelled alien is a citizen, for an injury to the citizen is an injury to his state.[97]

The following communication from Mr. Gresham, Secretary of State, to Mr. Smythe, our minister to Haytii, in 1895, embodied the foregoing principles:[98]

"The United States neither excludes nor expels foreigners except in pursuance of general laws. The provisions of these laws are or may be known in advance to all persons upon whom they are intended to operate. Ample time is given for compliance with the laws looking to the expulsion of foreigners and for the settlement of the business affairs of individuals to be affected by them, and ample opportunity is afforded them to show that they are not within the operation of the law.

"There is certainly nothing in the law or practice of this country which can be cited as a precedent for the arbitrary expulsion of foreigners without hearing and without cause. The just rule would seem to be that no nation can single out for expulsion from its territory an individual citizen of a friendly nation without special and sufficient grounds therefore. And even when such grounds exist, the expulsion should be effected with as little injury to the individual and his property interests as may be compatible with the safety and interest of the country which expells him.

"Not only is the right of excluding or expelling obnoxious aliens, as an attribute of national sovereignty, limited by the general principles of international law, but its exercise becomes further importantly modified by conventional obligations, such as are found in the existing treaty between the United States and Hayti, the stipulations of which clearly intend that no citizen of the United States in Hayti shall be deprived of liberty or subiected to punishment save by due process of law."

An interesting variation from the usual order was contained in the request of the Turkish government in 1896, that Armenian revolutionists in the United States who carried on their propaganda here calculated to promote revolution in Turkey, should be expelled from the United States. Mr. Olney, Secretary of State, said to the Turkish minister, Moustapha Bey:[99]

"There is no existing statute nor has any ever been enacted here which forbids the entrance into the United States of persons belonging to the category described, * * * nor any provision for the expulsion of aliens deemed obnoxious to their own governments from American territory. The only law restrictive of alien residents ever enacted by Congress is the Alien Act of June 25, 1798, which was passed very soon after the adoption of our present constitution, and which, however, merely authorized the deportation of such aliens as should be deemed 'dangerous to the peace and safety of the United States."

[97]See Amer. Jr. Intern. Law, I., pt. 1, 462.
[98]For. Rel., 1895, II., 801.
[99]For. Rel. 1896, 926.

That act continued in force for two years only from the passing thereof, and consequently expired by its own limitations, June 25, 1800. * * * The present immigration law of the United States, while forbidding the landing of certain obnoxious classes of alien convicts and authorizing the deportation within a limited time of such as should effect unlawful entrance into our territory, expressly exempts from its operations persons 'convicted of political offense'."

CONGRESSIONAL LEGISLATION.—Taking up now the legislation on this subject, we find that the first exercise of this power on the part of Congress was in the alien and sedition acts of 1798. The country at that time was in a very unsettled condition. The disorders attendant upon the Revolution had not yet passed away, while war with France seemed imminent and with England not improbable. There was constant abuse of those in office and much of it was by foreigners. It was believed that many of the alien residents in the country were not converted to the principles of republican government, but were, if not actual agents of the French government, at least willing to throw in their fortunes with the Jacobins and Tories against the new republic.

The acts of 1798 distinguish between alien friends and alien enemies.[100] As to the former the act[101] was limited to two years. It gave extraordinary power to the President to order all such aliens as he should deem dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect were concerned in any treasonable or secret moves against the government, to depart from the country within a certain time expressed in the order. If the alien so notified should afterwards be found in the country without the President's license to remain, he was liable to imprisonment for three years and was prohibited from ever afterwards being admitted to American citizenship. If he furnished proper security, the alien might be licensed by the President to remain in the country. If liable to imprisonment under the act, he might be forcibly expelled from the country whenever, in the opinion of the President the public safety required it. If an alien so arrested and sent out of the country returned voluntarily without permission, he might be imprisoned so long as the President thought the public safety required it. The effect of this provision of the act necessarily conferred upon the President all such power as might be needed for its enforcement; that is, it gave him practically unlimited power.[102]

[100]At this time there were alien laws against seditious libels in most of the European nations, and in France an alien had to obtain a license in order to remain in the country.

[101]1 Stat., 570.

[102]*Lockington v. Smith*, 1 Pet. C. C., 466. The order might be issued by the Secretary of State acting for the President. 7 Op. A.-G., 453.

As to alien enemies, the President was given authority[103] in time of war or invasion, after having made due proclamation, to apprehend, restrain, or remove all natives, citizens, denizens, or subjects of the hostile government, on such terms as he might see fit to impose. He was authorized in any such event to indicate the conduct to be observed on the part of the United States toward such aliens, the manner and degree of restraint to which they should be subject, and in what cases and upon what securities their residence might be permitted, and to provide for the removal of those who neglected or refused to depart; and to establish any other regulation necessary for the public safety. If the alien was not charged with actual hostility, or other crime against the public safety, he should be allowed the full time stipulated for by treaty, or if no treaty existed, such time as might be declared by the President, in which to remove or dispose of his effects. In this way, the property rights of those who might be summarily removed were secured.[104] These provisions regarding alien enemies are in force today as sections 4067, 4068, 4069, and 4070 of the Revised Statutes.

In the debates which took place in Congress over these masures, it was urged, by their opponents, that such power should be vested in Congress only, for if the power should be given to the President, he might exercise it in such a way as to cause retaliation and thus our citizens would be expelled from foreign countries and their property confiscated, at a time when Congress might not deem it expedient to go to war.[105] In support of the measures, it was claimed that when an enemy authorized hostilities, then was the time to take up the crowd of spies and inflammatory agents which overspread the country; that the measures were intended as a diplomatic defense before any actual war had begun.[106] Mr. Gallatin thought that the power to remove aliens whose continuance in the United States might be dangerous to the peace and safety of the country belonged solely to each individual state, "and that the general government has no power over them and, therefore, that all the provisions in this bill are perfectly unconstitutional," for power to banish or remove alien enemies had not been delegated to Congress and was, therefore, reserved to the states.[107] He pointed out that after the

[103]1 Stat., 577.

[104]That a declaration of war does not, of itself, enact a confiscation of the property of an enemy was declared in *Brown v. U. S.*, 8 Cr., 127.

[105]An. of C., II., 1575.

[106]Ibid., 1790, 1791.

[107]Ibid., 1955, 1958.

new constitution had been adopted and just prior to the time when it was to come into operation, Congress passed a resolution recommending to the several states to take measures to prevent the introduction of malefactors into the country from foreign nations. If Congress had supposed that it possessed the power to make regulations which it recommended to the states, it would have done so and not have called upon the states to make them. The states accordingly passed laws to this end, said Mr. Gallatin, and Pennsylvania, at least, had done the same after the constitution went into effect. Mr. Sewall replied that while the states might admit aliens, it did not follow that Congress did not have the power to make regulations respecting their continuance here, nor that Congress did not have the power to preserve the peace and tranquility of the country, and might in pursuance of such power order such aliens as it should deem dangerous to depart from the country.[108]

Almost immediately after the passage of the acts, petitions were sent to Congress to repeal that part which authorizes the President to remove such aliens as he should deem dangerous.[108a] It was stated that the law had produced great dissatisfaction, though the acts were never enforced and their constitutionality never came before the courts. Bassett states[109] that "Many Frenchmen left the country in anticipation of the law, and we may believe that it was chiefly planned *in terrorem*, for in not a single case was it applied." Commenting upon the provisions of the alien acts, Mr. Schuler says:[110] "There appeared likewise a vague pretense of invoking the judicial process by the aid of federal marshals; but the true purpose of these laws was plainly to trust the President's own discretion, thereby rendering the judicial machinery ancillary to the executive, and, in fact, marshals were to execute the President's will without any recourse whatever to the courts."[111]

The Sedition Act[112] followed shortly after the Alien Act and was intended to deal with aliens or citizens who presumed to criticise the government too severely. This act made it a high misdemeanor "unlawfully to combine and conspire" in order to oppose the legal measures of the government, or in order to prevent a federal officer from executing his duties, or with such purpose "to commit, advise, or attempt to procure any insurrection, riot, or unlawful assembly,

[108]Ibid., 1959.
[108a]An. of C., III., 2994.
[109]"The Federalist System," 259.
[110]History of the U. S., 396.
[111]See the Passenger Cases, 7 How. 513.
[112]1 Stat., 596.

or combination.'' To publish a false or malicious writing against the government of the United States, the President or Congress, with the purpose of stirring up hatred and resistance against them, or to incite any foreign nation to war against the United States, was made a misdemeanor punishable by fine, of not more than $2,000 and imprisonment not longer than two years.

As to the effect of the Sedition Act, it was stated in the House on the 21st of January, 1801[113] after the law had been in effect two years, that a few printers and a few miserable newspaper scribblers[114] had fallen victims to it, and that it had disgusted a large part of the American people who had loaded the tables of their representatives in Congress with petitions praying for the repeal of the obnoxious law. The measure was repealed very shortly after that and nothing like it has been attempted in our history since.

It is an established practice for states at war, or during revolution, to restrict the entrance or exit of strangers within their borders as well as the sojourn of such strangers, however opposed such regulations are to the policy of freedom in such matters which generally prevails. Thus, section 2171 R. S., provides that nothing contained therein should be taken to interfere with the apprehension and removal, pursuant to law, of any alien enemy at any time previous to actual naturalization. During our civil war we find some instances of the exercise of this power, By regulation of the department of State of August 19, 1861, it was declared ''that no person, if a foreigner, should be allowed to land in the United States without a pass-port from his own government, countersigned by a minister or a consul of the United States.'' This regulation, being a war measure, was not confined to aliens but prohibited any person from leaving the United States except with a passport.

From this time to the act of March 3 1863,[115] by which permits to leave the country were authorized to be given to aliens who had by their residence become subject to military duty, pass-ports were issued only to United States citizens; aliens were required to obtain them from their own governments. By the President's proclamation of May 8, 1863, aliens who had declared their intention to become citizens of the United States and who, by the act of Congress of that year, were required to perform military duties, and were also declared to be entitled to pass-ports and protection, were allowed a period

[113]An. of C., VI., 919.

[114]In all ten persons, Republican editors and printers, were tried and convicted under the Sedition Act, while some others were indicted but not tried.

[115]12 Stat., 754.

of sixty-five days in which to depart from the United States. The effect of this legislation and proclamation was to allow such persons to choose between accepting the character of citizens and remaining here as such, or of retaining their character as aliens and departing forthwith.

We come now to the legislation of Congress restricting or excluding certain classes of undesirable immigrants. Up to about 1880 the whole idea was that of encouraging immigration. In the act of March 3, 1875,[116] however, the importation into the United States of criminals and of women for the purposes of prostitution was forbidden.[117] The act of August 3, 1882,[118] prohibited the landing of any immigrant convict, lunatic, idiot, or any person unable to take care of himself without becoming a public charge. In re. O'Sullivan[119] the courts held that, if none of the facts authorizing the exclusion of an alien were found, such alien might enforce his right to land by habeas corpus proceedings. Likewise, in many of the early decisions it was held that where a person detained for deportation as an alien claimed that he was in reality a citizen of the United States, this allegation of citizenship made it a question for the courts.[120] The power to exclude aliens extends over those who have acquired a domicile in the country as well as to those who have not, and if a resident alien is liable to exclusion under the immigration laws, he may be deported although he has acquired a domicile here.[121] By the act of February 26, 1885,[122] aliens coming under contract to labor were, for the first time, excluded, and the act of February 23, 1887,[123] placing the execution of the act of 1885 under the Secretary of the Treasury, provided that all persons excluded by that act should be sent back to the country from which they had come.

By the act of March 3, 1891,[124] the list of excluded aliens was extended so as to cover not only those included in the act of 1882, but also persons suffering from dangerous diseases, polygamists, and those whose passage had been paid and who had no visible means of support. For the first time provision was made for the return of

[116]18 Stat., 477.

[117]See Report Indust. Com., XV., 771, 794. In *United States v. Johnson*, (7 Fed. Rep., 453) it was held that these provisions were applicable to immigrants from all countries alike.

[118]22 Stat., 214.

[119]31 Fed. Rep., 447.

[120]*Gee Foak Sing v. U. S.*, 49 Fed. Rep., 146; In re. Moses, 83 Fed. Rep., 995.

[121]*Fong Yue Ting v. U. S.*, 149 U. S., 698; In re. Ota, 96 Fed. Rep., 487.

[122]23 Stat., 332.

[123]26 Stat. 1084

all debarred aliens and for the return within one year after landing of all aliens who had entered unlawfully, or who had become public charges from causes arising prior to landing. Under this act of 1891, an order of deportation by an inspection officer, subject to the administrative review provided for, is such due process of law as to the alien as is required by the Fourteenth Amendment.[125] The courts still had the power, however, to pass upon the question as to whether the petitioner was an lien or not.[126] In the sundry-civil appropriations act of August 18, 1894,[127] it was provided that "In every case where an alien is excluded from admission to the United States under any law or treaty now existing or hereafter made, the decision of the appropiate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."[128] Thus the courts were excluded entirely from determining whether a person was an alien or not. The act of 1894 was contested in the Ju Toy case,[129] decided in 1905. The effect of that decision was to hold that unless the United State admits that the immigrant is a citizen, the decision of the proper administrative officers as to the facts and as to the jurisdiction is final.

By the act of March 3, 1903,[130] the following classes of immigrants, in addition to those provided for by the act of 1891, were excluded: Epileptics;professional beggars; "anarchists, or persons, who believe in or advocate the overthrow by violence of the government of the United States or of all governments or of all forms of law, or the assassination of public officers;" and those who have within a year been deported for violation of the contract labor law. The Secretary of the Treasury was given the power to deport any alien found in the country in violation of the law at any time within three years after his arrival.[131] As to the right to land, the decision

[125]*Ekiu v. U. S.*, 142 U. S., 651; *Yamataya v. Fisher*. 189 U. S., 86; *U. S. v. Ju Toy*, 198 U. S., 253.

[126]Re. Simone, 108 Fed. Rep., 942.

[127]28 Stat., 390.

[128]The immigration acts were made applicable to aliens who had acquired a domicile here and had afterwards gone abroad and then attempted to reenter the country.—*Lem Moon Sing v. U. S.*, 158 U. S., 358. The provisions of this act of 1894 did not apply, however, to aliens unlawfully in the country and arrested for deportation.—*Chan Gun v. U. S.*, 9 App. D. C., 290.

[129]198 U. S., 253.

[130]32 Stat. 1214.

[131]This provision was repeated in the act of 1907, and on March 31, 1908, the Secretary issued a sweeping order to all commissioners of immigration and inspectors to confer with the police in their respective jurisdictions with a view to "securing the cooperation of the police and detective forces in an effort to rid the country of alien anarchists and criminals falling within the law relating to deportation."

of the Secretary of the Treasury, on appeal, was made final. So, an immigrant may be excluded by administrative process only, but a resident alien, while on trial, may not be denied the right to judicial proceedings.[132]

In the act of February 20, 1907,[133] providing that any girl or woman brought to the country for the purpose of prostitution, or who should become a prostitute within three years, might be deported within that length of time, there is also contained the provision that whoever holds, keeps, maintains, supports, or harbors such alien woman in any place for the purpose of prostitution within three years after she shall have entered the United States, shall be deemed guilty of a felony. This is extraordinary legislation and the results of the cases arising under it will be looked forward to with interest. Not only is a woman who may become a prostitute nearly three years after her arrival in the country, liable to deportation, and thus to a penalty not placed upon citizens, and this in spite of the fact that she may in the meantime have become an American citizen by marriage and may have children who are American citizens, but any one who has aided her within that period in her delinquency is to be deemed guilty of a felony. Note.—Since the above was written, the Supreme Court has remanded to the U. S. District Court of northern Illinois a case of harboring alien women for questionable purposes. The unconstitutionality of this part of the act of 1907, makes necessary, in order to secure conviction, to prove that the importation has been for immoral purposes. This places the matter just where it was before the act of 1907 was passed and makes conviction very difficult to secure. Justice Brewer, in delivering the opinion referred to above, intimated that the matter under consideration was one falling within the jurisdiction of the state courts as a part of the police power. In spite of these objections to the measure, the constitutionality of acts of deportation does not seem to have been generally questioned since the decision in *Turner v. Williams* (1903).[134] In this case the right to deport an alien anarchist was contested as being in contravention of the First, Fifth, and Sixth Amendments. (*i. e.*, the clauses relating to freedom of religion, due process, and trial by jury). In this case, Mr. Justice Fuller, speaking for the court, said:

"Repeated decisions in this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions

[132]*Wong Wing v. U. S.*, 163 U. S., 228; Freund, "Police Power," sec. 704.
[133]34 Stat., 898.
[134]194 U. S., 279.

on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the constistution securing the right of trial by jury have no application.

"Whether rested on the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the act before us is not open to constitutional objection."

SUMMARY AS TO THE CHINESE.—A final word may be said regarding the acts and decisions relating to the Chinese in particular. The Chinese immigrants, almost exclusively from the coolie class, came in such numbers[135] that, as has already been pointed out, the feeling against them led to attempted exclusion acts on the part of the coast states during the seventies. While a state may, in the exercise of its police power, exclude such foreigners as are unquestionably dangerous to the public health and morals, yet it may not discriminate against the citizens of any foreign treaty power as a class.[136]

In 1880, as already indicated, an agreement was made with China by which the United States might limit or suspend the immigration of Chinese laborers, and between 1882 and 1892, particularly, Congress enacted many laws directed to the exclusion and deportation of the Chinese. More than one hundred cases have arisen involving the statutes and the treaties with which the statutes were often in conflict. No attempt will be made here to consider these cases but only a brief statement will be made of the situation as it finally evolved. As to the relation of the statutes to the treaties, the supreme court always upheld the former, though plainly in violation of treaty rights, throwing the onus upon Congress and plainly intimating that Congress might be answerable to China for such violations. In the first Chinese Exclusion Cases,[137] Mr. Justice Field said: "Whether a treaty has been violated by our legislature, so as to be the proper occasion of complaint by the foreign government, is not a judicial question. To the courts it is simply the case of conflicting laws, the last modifying or superseding the earlier." In this case the supreme court upheld the power of Congress to exclude from the country such aliens as it might deem best to exclude, de-

[135]See 44th Cong., 2d ses., S. R., No. 689.

[136]In re. Ah Fong, Fed. Case, No. 102; *Chy Lung v. Freeman*, 92 U. S., 275

[137]130 U. S., 581.

claring that "the power of the legislative department of the government to exclude aliens from the United States is an incident of sovereignty which cannot be surrendered by the treaty making power."[138]

In the Second Chinese Exclusion Cases, decided in 1893,[139] the court considered very fully all the questions involved in the power of Congress to exclude aliens in general, and also those whose coming was stipulated for by treaty. The court not only upheld the legislative power to exclude, but also to commit the facts involved to the execution of executive officers, or to call in the aid of the judiciary to ascertain the contested facts upon which the alien's right to enter is made to depend. In this case it was said that "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power."

In the Lem Moon Sing case (*supra*) decided in 1895, it was held that an alien who had acquired a commercial domicile in the United States and who had voluntarily left the country for a temporary sojourn abroad acquired no right by virtue of such previous domicile here to reenter the country, in face of the exclusion act passed during his absence. It was held, however, that the alien denied the right to land was entitled nevertheless to a writ of habeas corpus, or, if in the country, to the right to go before the courts before being expelled. While the alien lawfully remains in the country, he is entitled to the benefit of the guarantees of life, liberty, and property, as secured by the constitution to all persons of whatever race within the jurisdiction of the United States. A Chinese alien might not, therefore, be imprisoned under the act of May 5, 1892, by a commissioner, without a trial by jury.[140]

The treaty of 1880 and the various exclusion acts were so interpreted as practically to exclude all immigration other than that of "officials, teachers, students, merchants, or travelers for curiosity or pleasure."[141] In 1894 the new treaty secured the status already arrived at, except as to that provision of the act of 1888 which forbade Chinese laborers who had departed to return to this country. Mr. Wu, the Chinese minister, at Washington, in a note of November 7, 1898, to the Secretary of State, protested against the interpretation that was being placed upon the treaties and legislation, contending that the object of both was to keep out the laboring class and not

[138]For a protest on the part of China at the way the treaties were observed, see 50th Congress, 1st ses., S. R. II., Doc. 272.

[139]149 U. S., 698.

[140]*Wong Wing v. U. S., supra.*

[141]*Lee Ah Yin v. U. S.*, 116 Fed. Rep., 614.

to exclude all but the specifically exempted classes. The Secretary replied that the decisions of the courts and departmental constructions had sometimes borne out the contention of Mr. Wu, but that the matter had all been recently given careful consideration and the decision reached that the true intent of the law was to admit only the specified exempted classes.

In the Sing Tuck case[142] decided in 1904, it was held that the parties might be denied the writ of habeas corpus even though they claimed United States citizenship because they had not complied with the preliminary sifting process as required by the law; *i. e.*, they had not stated their case fully to the inspector and then appealed from him to the decision of the Secretary of the Treasury before coming to the court. It was clearly suggested, however, that if the alien did comply strictly with the requirements of the statute and did establish a prima facie case of United States citizenship, that he would be entitled to have the legality of his detention judicially determined. Great was the surprise, in the light of this decision, when the next year in the Ju Toy case the administrative process was exhausted and yet the writ of habeas corpus was denied on the ground that no abuse of authority, as vested in the executive officers, was shown. It would seem under this decision that unless there has been an arbitrary denial of all testimony, the writ of habeas corpus will not lie, and that a citizen even may be excluded from the country by ministerial officers, though this has generally been thought impossible, even by Congress, except as a punishment for crime.[143]

The result of the Chinese legislation and decisions is to uphold the unlimited power of Congress to exclude or to expel from the country such aliens as it may deem advisable, and to commit the finding of the facts exclusively to executive officers.

We thus conclude that the exclusion and expulsion of aliens is a general right of sovereignty, one which our government has exercised itself and has acquiesced in when exercised by other powers. Our legislation on the subject began with the Alien and Sedition Laws; in recent years, many acts have been passed excluding undesirable classes of immigrants, and providing for the return of those who have gained an unlawful entrance. In all such cases the decision of the appropriate administrative officer has been made final and this legislation has been upheld by the courts as fulfilling the requirement of due process of law.

[142]128 Fed. Rep., 592.
[143]Re. Look Tin Sing, 21 Fed. Rep., 905.

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